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CASES

ARGUED AND DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS

OF THE

STATE OF MISSOURI

FROM JANUARY 10, 1876, TO APRIL 10, 1876.

REPORTED BY

A. MOORE BERRY,

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JUDGES

OF THE

ST. LOUIS COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

HON. THOMAS T. GANTT, *Presiding Judge.*

HON. EDWARD A. LEWIS, } *Judges.*
HON. ROBERT A. BAKEWELL, }

JOSIAH THORNBURGH, ... *Clerk.*

A. MOORE BERRY, ... *Reporter.*

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INTRODUCTION.

The St. Louis Court of Appeals was created by the State Constitution of 1875, from a manifest public necessity. The heavy accumulation on the docket of the Supreme Court, with its increasing accessions from the advancing commerce, population, and wealth of Missouri, demanded an amount of judicial labor which no single tribunal could possibly perform. The able and learned judges of that court had long subjected themselves to an enormous overworking, and yet could make no material advance upon a docket already more than two years in arrear. The taking of appeals for mere purposes of delay had become a growing public evil.

It was considered that an appellate court adapted to the wants of St. Louis and some of the neighboring counties, comprising together more than one-third of the wealth, population, and commercial interests of the State, would so far divide the labors of the Supreme Court as to advance largely the general ends of justice, if not to satisfy fully the crying demand for its more speedy administration.

The classes of cases which, under the Constitution, may be taken by appeal or writ of error from the Court of Appeals to the Supreme Court comprehend, as is found in practice, about one-eighth of all the causes that reach the former court. It results that, as to about seven-eighths of the current litigation within its district, the St. Louis Court of Appeals is the last resort. This single fact sufficiently explains the necessity felt in the inferior courts, in the legal profession, and in the interests of popular justice for a publication, in customary form, of the important decisions rendered. This necessity was recognized by the General Assembly of Missouri at its last session, when an act was passed, approved April 24, 1877, authorizing the appointment of an official reporter and the publication of the series of reports which this volume introduces.

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The present volume contains, with a few exceptions, all the opinions delivered during the time embraced within these reports; but future volumes will contain such opinions only as shall be selected for publication by the judges of the Court of Appeals. As to all the cases not so selected, full notes or *syllabi* of the rulings will appear in an appendix; so that each volume will exhibit, in one form or other, every point decided by the court and the disposition of every cause before it during the period covered. The selection of opinions for publication will, it is understood, be made with a general reference to the following classification, viz.: 1. Important decisions wherein adjudication by the St. Louis Court of Appeals is made final by the terms of the Constitution. 2. Other decisions, of special interest to the bench and bar, which have been rendered final by failure to carry the causes any further. 3. Decisions upon which an appeal or writ of error has ensued, and which involve great public interests or novel applications of important principles.

A. MOORE BERRY,

Reporter.

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CASES

ARGUED AND DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS.

JANUARY TERM, 1876.

THE STATE OF MISSOURI, Plaintiff in Error, *v.* WM. FOSTER, Defendant in Error.

January 10, 1876.

Appellate courts will not consider any papers filed in the trial court after a writ of error has been issued, and after the bill of exceptions has been made up and the trial court adjourned for the term.

ERROR to Warren Circuit Court.

Order for stay of execution denied.

P. P. Stewart, for plaintiff in error, cited: State *v.* Bryant, 55 Mo. 79; State *v.* Wyatt, 50 Mo. 309; State *v.* Ostrander, 30 Mo. 17; State *v.* Smith, 53 Mo. 271; Sloan's Case, 47 Mo. 604; State *v.* Dunn, 18 Mo. 224; State *v.* Hays, 23 Mo. 324; State *v.* Holme, 54 Mo. 161; State *v.* Underwood, 57 Mo. 49.

Nat. C. Dryden and *William L. Morsey*, for defendant in error, cited: Wag. Stat. 1090, sec. 27; State *v.* England, 19 Mo. 386; Williams *v.* State, 30 Texas, 404; McBean *v.* State, 3 Heisk. (Tenn.) 20; Dutell *v.* State, 4 Greene (Iowa), 125; Wise *v.* State, 2 Kan. 419; State *v.* Holme, 54 Mo. 161; State *v.* Hudson, 59 Mo. 138; State *v.* Schoenwald, 31 Mo. 147; State *v.* Starr, 38 Mo. 270; 3 Greenl.

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25, sec. 24; 1 Greenl. sec. 55; 1 Ph. on Ev. (9th ed.) 469; Best on Ev., 213, sec. 153; Regina *v.* Rowton, 11 Jur. (N. S.) 325.

BAKEWELL, J., delivered the opinion of the court.

This cause is brought here by writ of error, and, the defendant being sentenced to be hanged on the 19th of the present month (January, 1876), we are asked to stay the execution.

This we cannot do unless, on inspection of the record, we are of opinion that probable cause exists for the appeal, or so much doubt as to render it expedient to take the opinion of the Supreme Court. It has, therefore, become necessary to inspect the record. We have done this with great care, and find no probable cause for this appeal, and no doubt rendering it expedient to take the opinion of the Supreme Court thereon.

Certain papers are appended to the bill of exceptions, with the certificate of the clerk of the Warren Circuit Court attached that they are full and complete copies of what is described as "a supplemental motion to set aside the verdict and judgment, and affidavits in support of the same." The certificate of the clerk further shows that these papers were filed with him after the bill of exceptions was made up, after the writ of error was issued from this court, and after the Warren Circuit Court had adjourned for the term.

This so-called "supplemental motion" and these alleged affidavits we cannot judicially consider, for any purpose whatever. The cause was pending here, and not in the Warren Circuit Court, at the time they were filed (*Foster* v. *Rucker*, 26 Mo. 494), and we have nothing whatever to do with them, as we can only consider matters of error committed by the court below. Parties will not be allowed to urge in this court points not made below.

These affidavits may have been intended to form the basis for an application to the trial court for a writ of error *coram nobis*, to correct some matter not apparent upon the record

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itself, or they may present facts of such a character as should be addressed to another department of the government; but, whatever may be the intended office of this motion and these affidavits, they should not be forwarded to us in this shape.

For the reasons stated, we refuse to make any order directing that the writ of error shall operate as a stay of proceedings on the judgment in this case. All the judges concur.

THE STATE OF MISSOURI, Defendant in Error, v. HENRY REAKEY, Plaintiff in Error.

January 26, 1876.

1. An indictment for murder, which states that the *assault*, but not that the wounding which caused death, was willful, deliberate, and premeditated, *held* to be insufficient to support a conviction.
2. The manner in which the murder was committed must appear with certainty in the indictment.
3. The indictment must lay the time of death within a year and a day from the wounding.
4. An indictment that concludes, "against the peace and dignity of the state, and against the form of the statute," etc., is not bad as not concluding "against the peace and dignity of the state."
5. The word "immediately" will not supply the place of "then and there" in an indictment.

ERROR to Lincoln Circuit Court.

Reversed and remanded.

Wm. A. Alexander, for plaintiff in error, cited: Wag. Stat. 445, sec. 1; State v. Jones, 20 Mo. 58; Old Const., sec. 26; Art. 6, New Const., sec. 38; State v. Loper, 19 Mo. 254; State v. Manafield, 41 Mo. 470.

Josiah Creech, Circuit Attorney, for defendant in error.

BAKEWELL, J., delivered the opinion of the court.

Henry Reakey was indicted at the fall term of the Circuit Court of Lincoln county, in October, 1875, for the murder of his wife. He was tried and convicted of murder in the

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first degree. Motions in arrest and for a new trial were made and overruled, and, exceptions being properly taken, the case is brought here by writ of error.

The counsel for appellant contend that the motion in arrest should have been sustained by reason of the insufficiency of the indictment.

The indictment is as follows:

"State of Missouri, county of Lincoln. The grand jurors of the State of Missouri, summoned from the body of Lincoln county, impaneled, charged, and sworn, upon their oaths present that Henry Reakey, late of the county aforesaid, on or about the 9th day of September, A. D. 1875, at the county of Lincoln, State aforesaid, did feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought, make an assault on and upon the body of one Eliza Reakey, and that the said Henry Reakey, at the time and place as aforesaid, with a stick or cudgel of some kind unknown to these jurors, and with his opened right hand, the same being deadly weapons, the which the said Henry Reakey then and there held in his hand or hands, to, at, and against the said Eliza Reakey, he, the said Henry Reakey, then and there feloniously, on purpose, and of his malice aforethought, with said stick or cudgel of some kind unknown to these jurors, as aforesaid, did strike, penetrate, bruise, and wound the said Eliza Reakey, in and upon the right side of the forehead, immediately over the right eye, fracturing the skull of the said Eliza Reakey with said stick or cudgel as aforesaid, and in and upon the throat, with his open right hand, seized, choked, suffocated, and strangled her, the said Eliza Reakey, thereby giving her, the said Eliza Reakey, then and there, with the said stick or cudgel of some kind unknown to these jurors as aforesaid, and with his open right hand as aforesaid, by means of striking, penetrating, bruising, choking, suffocating, strangling, and wounding the said Eliza Reakey as aforesaid, two mortal wounds in and upon the right side of the forehead, imme-

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diately over the right eye, and in and upon the throat of her, the said Eliza Reakey, of which said mortal wounds, from the said stick or cudgel, and from the said choking and strangling her with the said right hand as aforesaid, the said Eliza Reakey immediately died.

"And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Henry Reakey, in the manner and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, of his malice aforethought, did kill and murder the said Eliza Reakey, as above stated, against the peace and dignity of the State, and contrary to the form of the statute in such cases made and provided by the State."

Is this indictment, under our statute, sufficient to support a conviction for murder in the first degree?

1. It sets forth that the assault was willful, deliberate, and premeditated, but it does not state that the wounding, bruising, and penetrating by which death is alleged to have been effected were willful, or deliberate, or premeditated. This we regard as fatal to the indictment.

2. But the indictment is also insufficient in that it is inaccurate and insensible. The words used in describing the offense are nonsense. The right hand is declared to be a deadly weapon; and if the indictment be not repugnant, it is at least uncertain, both in its description of the wound and of the part of the body upon which it was inflicted. It is impossible to say with certainty, from the wording of this indictment, whether it is intended to charge that defendant inflicted two mortal wounds upon the throat and two upon the forehead of the deceased, or two on the forehead and none on the throat, or one mortal wound on the throat and one on the forehead. The part of the body where the violence was inflicted must be set forth with certainty. *State* v. *Jones*, 20 Mo. 58. The manner in which the murder was committed does not, in this indictment, appear with sufficient accuracy.

3. The indictment does not sufficiently charge the time

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of death. In case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The date of the death, as well as that of the mortal stroke, must, therefore, distinctly appear. In *Lester* v. *The State*, 9 Mo. 658, the indictment alleged that "the said Scott did *instantly* die," and this was held insufficient.

The indictment in the present instance charges that "said Eliza Reakey *immediately* died." In capital cases great strictness in material averments is required, and, as is said by the learned judge delivering the opinion of the court in the case just cited, if established precedents are lost sight of, it is impossible to see where innovation will stop. If the word *instantly* is held not to supply the place of "then and there" in an indictment, the word *immediately* cannot be said to do so.

It was further objected to the indictment that it does not conclude "against the peace and dignity of the state." The law requires that all indictments shall so conclude; but we are of opinion that this indictment complies with the law in this respect. Some words which are quite useless are added at the end; they should have been omitted, but the conclusion of the indictment is "against the peace and dignity of the State," for all that.

By the ancient law, in all peculiar jurisdictions, offenses were said to be done against his peace in whose court they were tried; in a county palatine, *contra pacem domini:* in a sheriff's court, *contra pacem vice-comitis;* in the court of a corporation, *contra pacem bailivorum;* and, as in the Court of King's Bench, the supreme court of common law in the Kingdom of England, they are said to be done *contra pacem Regis*—"against the peace of the *King*"—so, in this republic, they must by law be alleged, in the conclusion of the indictment, of course, to be done "against the peace and dignity of the *State*."

That the words, "and against the form of the statute," etc., have been carelessly added, does not make the indict-

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ment bad; it concludes, "against the peace and dignity of the State."

On the trial of the cause a witness was allowed to testify, against the objection of the counsel for the accused, that he heard a conversation between Reakey and one Michor, in which, speaking of the coffin prepared for his wife's burial, Reakey said that, "if the box was not big enough, he could mash her into it;" and another witness for the State was also allowed to testify, against the objection of counsel for the prisoner, that, speaking of the death of Reakey's wife, a few days after the occurrence, he told Reakey it was "a bad state of affairs," to which Reakey replied "that it was," and then the witness asked Reakey if he was "going to get another wife," and Reakey said "he was, as soon as he had done sowing wheat." It is urged that this testimony was manifestly incompetent, and had a tendency improperly to prejudice the jury against the accused.

We think this evidence of conversations, occurring, as appears from the testimony, immediately after the death, was admissible, as tending to show want of affection, and as justifying the jury in inferring the same state of mind at the time of the alleged homicide. But it is not necessary to pass upon this, as, for the reasons stated, we think the indictment is bad, and the judgment of the Circuit Court must be reversed and the cause remanded. The other judges concur.

THE STATE OF MISSOURI, Respondent, v. MEREDITH WATERS, Appellant.

January 26, 1876.

1. An indictment ending with the words "against the peace and dignity of the State, and contrary to the form of the statutes in such cases made and provided by the State," is not bad, as in violation of the constitutional requirements that all indictments shall conclude "against the peace and dignity of the State."

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2. A defendant, indicted for murder, appeared in court and agreed with the State's attorney that his trial might proceed on the next day but one; and on the next—being the intermediate—day, demanded a list of the jurors, to be furnished him forty-eight hours before the trial. The list was delivered to him on the same day. *Held*, that in agreeing upon the day for trial he waived his rights as to time, and could not demand a postponement because the jury list was not furnished him forty-eight hours before the trial.

3. In a trial for murder the defendant cannot be compelled to make his peremptory challenges until a panel of forty competent jurors is obtained. The State cannot, by waiving her peremptory challenges, justify a reduction of the panel, and it is error in the court, upon such waiver, to require the defendant to select the jurors from a panel of thirty-two. (GANTT, P. J., dissenting.)

Per GANTT, P. J., dissenting: The defendant could not be prejudiced by a reduction of the panel of jurors to the number from which he would otherwise make his peremptory challenges, after the challenges made by the state, when such reduction results from the State's declining to make any challenges. There was no error in so ruling, and the judgment ought to be affirmed.

APPEAL from Lincoln Circuit Court.

Reversed and remanded.

McKee & McFarland, for plaintiff in error, cited: Mo. Const., Art. 6, sec. 26; State *v.* Lopez, 19 Mo. 255; Clements *v.* State, 4 W. Va. 755; Wag. Stat. 800, sec. 24, p. 1102, secs. 7, 8; State *v.* Klinger, 46 Mo. 224; State *v.* Buckner, 25 Mo. 168; State *v.* McCarron, 51 Mo. 27; State *v.* Holme, 54 Mo. 153.

Josiah Creech, for defendant in error, cited: State *v.* Hayes, 23 Mo. 287; State *v.* Klinger, 46 Mo. 224; Wag. Stat. 1090, sec. 27.

LEWIS, J., delivered the opinion of the court.

The defendant was convicted upon an indictment for murder in the first degree. The indictment concluded with these words: "Against the peace and dignity of the State, and contrary to the form of the statutes in such cases made and provided by the State."

Defendant moved unsuccessfully in arrest of judgment, alleging this form to be in violation of the constitutional requirement that "all indictments shall conclude 'against

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the peace and dignity of the State.'" He here insists that, although these words appear near the end, yet, as they are not the last or concluding words, the indictment is bad.

The "conclusion" of an indictment is one of its formal parts or divisions, with which lawyers are generally familiar, and to which reference was made by the framers of the Constitution. It indicates the power or authority against which the facts charged constitute an offense. For such indication, it cannot be necessary that any particular word shall be the last in the indictment. At common law the conclusion was, as to some crimes, "*contra formam statuti;*" and, as to others, "*contra pacem et dignitatem Regis.*" It was never imagined that either of these forms constituted any the less a proper conclusion because one or more words, not altering the sense, were superadded. In other states, which have a constitutional provision similar to ours, sundry efforts have been made to exact a literal transcript of the words, without addition or omission, as indispensable. In a few instances, not strictly analogous to the present case, the exaction was sustained. But the array of authorities holding the opposite view is so overwhelming as to leave no license for a further discussion of the question. The general doctrine is that, if the intent of the Constitution be substantially responded to in this part of the indictment, a literal transcript of the formula is not essential. It is further held that, if the formula be present, other words, not perverting the meaning, will be treated as surplusage. In the light of these rules all objections to the present indictment vanish, excepting, perhaps, such as refer to possible violations of taste. *Zarresseller* v. *The People*, 17 Ill. 101; *Anderson* v. *The State*, 5 Ark. 444; *Commonwealth* v. *Young*, 7 B. Mon. (Ky.) 1; *State* v. *Kean*, 10 N. H. 347; *State* v. *Yancey*, 1 Const. Rep. S. C. 237. In *State* v. *Lopez*, 19 Mo. 255, neither the words "against the peace and dignity of the State," nor any equivalent, appeared. The same is true of other cases cited for defendant. In *Lemons* v. *The*

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State, 4 W. Va. 755, the expression "W. Virginia" was used, instead of the name "West Virginia," as prescribed in the Constitution; wherefore the indictment was held to be bad. This was no case of surplusage. It was the rejection of a name given by the Constitution, and the adoption of a different one. We find no error in the ruling of the Circuit Court on the point under consideration.

It appears from the record that, on October 6, 1875, the defendant appeared in court, waived an arraignment, and agreed with the State that his case should be tried on the 8th; that on the 7th he made a formal demand for a list of the jurors, to be furnished him "forty-eight hours before the trial." The list was then furnished, but on the 8th he declared himself not ready for trial, because forty-eight hours had not elapsed since his receipt of the list of jurors. The court disregarded the objection, and directed the trial to proceed, to which ruling the defendant excepted.

In *State* v. *Klinger*, 46 Mo. 224, Judge Wagner, construing the provision (Wag. Stat. 1102, sec. 8) upon which this claim was founded, says: "It is simply a privilege which the statute extends to the accused for his benefit, and, if he does not make the demand or require the list, he is presumed to have waived it." It seems unquestionable that, if the accused may waive the entire privilege, he may, with equal effect, waive one of its elements—that of time, for instance. The defendant in this case, forty-eight hours before the time of trial fixed by his own agreement, and for yet twenty-four hours later, made no demand for a list of the jurors. He waived it, then, up to twenty-four hours before the trial, when his demand was complied with as soon as made. It would be strange, indeed, if he could be allowed thus to mislead the State by a waiver and a consent to trial, only to withdraw the waiver at convenience. By his silence, when the day of trial was agreed upon, he at least waived the element of time in his right to be furnished with the jury list. He could then assert no right until

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demand actually made; and from that time, as the record shows, he was allowed no cause of complaint. The ruling on this point was manifestly proper.

In another matter of exception the action of the Circuit Court was less free from objection. Upon proceeding to trial of the cause, as the record shows, "the court ordered the clerk to deliver to the defendant a list of thirty-two qualified jurymen from which to select a jury, the State having waived her challenges. To which order of the court, compelling the defendant to select a jury from said list containing only thirty-two qualified jurors, the defendant then and there excepted."

In murder cases, the State is entitled to eight and the accused to twenty peremptory challenges. Section 7, Wagner's Statutes, page 1102, says:

"There shall be summoned and returned, in every criminal cause, a number of jurors equal to the number of peremptory challenges, and twelve in addition; and no party shall be required to make peremptory challenges before a panel of such number of competent jurors shall be obtained."

According to this, forty competent jurors were necessary to make up the panel in the present case.

It is argued that, by the State's surrender of her eight challenges, there was left to the defendant his full number of twenty, before the jurors were reduced to twelve. Admitting this to be true, I do not know by what authority we can accept proposed results as an excuse for disobeying a positive rule of law. When the law prescribes a specific method by which a thing must be done, we have no right to reject that method and adopt a different one merely because, in our opinion, the latter is as good as the former to produce the result intended. This consideration alone is, to my mind, conclusive of the question.

But the argument is fallacious, even as applied to the ultimate design of the statute. The privilege which the

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law intends is not merely that the accused may reject twenty men before the jurors are elected for the trial. If this were all, they might be presented successively, one at a time, until his peremptory challenges were exhausted. He would then be allowed no choice between the next man or men—although possibly far more obnoxious—and the twenty who preceded them. The law means that the defendant, upon a survey of forty names presented to him, may, by tests of his own, which no man may question, determine which twenty of them are likely to be less, or more, inimical to his interest than the remainder. This comparison of the jurors, one with another, is of the very essence of the privilege. It seems idle to pretend that such a comparison, when limited to a panel of thirty-two, is of equal value with one which may range over forty names. Hence, in *State* v. *McCarron*, 51 Mo. 27, where the circuit court, upon the qualifying of the first twelve men out of a panel of forty, had required the parties to make their peremptory challenges before the calling of the remainder, the judgment was reversed. Said the Supreme Court: "The defendant was entitled to challenge twenty peremptorily, and the State eight; and till the whole forty men were called, passed, and qualified as jurors, the court could not require either party to exercise the right of peremptory challenging."

It is contended that, upon the presentation of forty names, the State's challenge of eight still reduces the number out of which the defendant may choose to thirty-two; and that, if eight had been added in the present instance, as demanded by the defendant, the State, by challenging the same eight (or refusing to make any challenges), would have restored the situation as before. These propositions will not bear analysis.

As to the first: There is no law by which the State is either entitled or required to make her challenges first. Indeed, a different practice was expressly sanctioned in

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State v. *Hays*, 23 Mo. 287. The defendant, then, exercising his right either first or simultaneously with the State, may, by striking out some of the eight otherwise proposed to be omitted by the State's waiver, compel the State to challenge an equal number of the remaining thirty-two. On the other hand, if the State challenge first, she may reject but a few or none of the eight who would, by her waiver, have been omitted from the panel, and thus enable the defendant so to make his challenges as to secure others of the same eight upon the jury which is to try him. In either case the composition of the trial jury would differ from that created from a panel of thirty-two names with a waiver of the State's privilege. Say that these are only chances; and yet they are precisely the chances of which, among others, the law enables the defendant to avail himself according to his best judgment. The second proposition stands upon a similar footing. It could never be held in advance that the State would infallibly reject the eight additional names, or would decline to challenge at all. There would be chances, at least, the other way; and, whether good or bad, many or few, the defendant cannot lawfully be deprived of them.

But, however we may speculate about practical results, it is enough, as before intimated, that the law here prescribes an exact method by which we are to reach them. It is the business of courts to declare the law; not to make or improve upon it, nor yet to substitute equivalents. The language employed by Judge Wagner, in *State* v. *Holme*, 54 Mo. 160, seems eminently appropriate here:

"No error that is not a violation of some positive rule of law, or which may not possibly prejudice the defendant, can be a ground for reversal on appeal; but it is with great hesitancy that the courts will say, in a criminal case, that an error does not prejudice the defendant. In the present case a positive rule of law is violated, and the statute which declares that certain persons shall be selected to try the

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cause is set at naught, and other persons substituted in their place. And this is done against the objections of the defendant, made at the time. In this action we think the court committed a substantial error."

Judge BAKEWELL concurring, the judgment must be reversed and the cause remanded. Judge GANTT dissents.

GANTT, P. J., delivered a dissenting opinion:

I am unable to concur with the majority of the court in this case. I find no error in the record. The supposed error consists in the order made by the Circuit Court that, the State having waived its right of peremptory challenge altogether, the accused should proceed to make his challenges when the panel was, by challenges for cause, reduced to thirty-two competent jurors.

The provision of the statutes supposed to be violated by this order is the following:

"There shall be summoned and returned in every criminal case a number of qualified jurors equal to the number of peremptory challenges, and twelve in addition; and no party shall be required to make peremptory challenges before a panel of such number of competent jurors shall be obtained." Sec. 7, p. 1102, of Wag. Stat.

In capital cases the accused may peremptorily challenge twenty, and the State may challenge eight. If both parties wish to exercise their full right of challenge, a panel of forty will be required in such cases. But either party may waive this right. At any rate, it is not to be doubted that the State may waive it.

Accordingly, when, by reason of challenges for cause, the panel was reduced to thirty-two, the State, wishing to save time, waived its right of peremptory challenge altogether, and requested the court to order the accused to make his challenges from a panel which accurately consisted of the full number of peremptory challenges possible, and twelve in addition. In substance, the State said: "I wish to save

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time. The panel now consists of twelve, besides the peremptory challenges of the accused. I waive my right of challenge altogether. It is to no earthly purpose that eight more jurors should be added to the panel. I can, at my option, either confine my challenge to these new men, or refuse to make any challenges. In neither case can any of the eight form part of the traverse jury. In both cases that body must be composed of the same men, part of the original thirty-two, who may be left after the accused has exhausted his right of challenge. If he confines himself to the original thirty-two, there will be, in either case, twelve of these remaining. If he challenges some of the eight new men, there will be more than twelve remaining of the original thirty-two. When the challenges are over, the first twelve remaining on the panel will compose the traverse jury. By no possible chance can the accused put on that jury any of the new or additional men. It will, therefore, be entirely useless and vain to put them on the panel."

The Circuit Court saw no answer to this reasoning, nor can I. If a possibility of prejudice to the prisoner resulted from the order made by the court, I should be in favor of reversing the judgment. Seeing no such possibility, and believing that the rule of law which compels no one to do a vain or useless thing is emphatically applicable to courts of justice, I am in favor of affirming the judgment of the Circuit Court.

THE STATE OF MISSOURI, Respondent, v. DAVID S. RANDOLPH, Appellant.

January 31, 1876.

1. **Under the act of February 7, 1874, for the preservation of game, proof that the defendant, a restaurant keeper, caused game to be served to his customers on a certain day within the prohibited period will support a conviction, notwithstanding the fact that there was proof tending to show that the prairie chickens in question had been shipped from the State of Kansas.**

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2. **A State law which prohibits the selling or keeping in one's possession of certain game within a certain period of the year is valid, even when applied to game imported from another State, and, in this application, it is not such a regulation of commerce as belongs exclusively to Congress.**

Appeal from the St. Louis Court of Criminal Correction. *Affirmed.*

Melville Smith, for appellant, cited: State *v.* Parkard, 26 Mo. 340; State *v.* Marshall, —Mo. —; State *v.* Spenlove, Riley (S. C.), 269; Peck *v.* State, 7 Humph. 78; Gibbons *v.* Ogden, 9 Wheat. 1; State *v.* Scott & North, 27 Mo. 473; State Freight Tax, 15 Wall. 232; Potter's Dwar. on Stat. 245, and cases there cited.

M. W. Hogan and *J. D. Johnson*, for respondent.

Bakewell, J., delivered the opinion of the court.

Defendant was convicted on July 23, 1874, in the St. Louis Court of Criminal Correction, of a violation of section 3 of the act of the General Assembly entitled "An act for the preservation of game," approved February 7, 1874, by having in his possession three prairie chickens in July, 1874.

The language of the act is as follows:

"Section 1. It shall be unlawful, in any place in this State, to catch, kill, injure, or pursue with such intent, any pinnated grouse, commonly called prairie chicken, between the first day of February and the fifteenth day of August.

"Section 3. It shall be unlawful for any person to purchase, have in possession, or expose for sale any of the birds or game mentioned in the preceding section 1 of this act, during the season when the catching or injuring the same is prohibited."

The conviction was upon the 1st count of the complaint, of having in his possession three pinnated grouse, on or about July 8th; and defendant was fined $9, being $3 for each bird.

The evidence is that three prairie chickens were cooked and dressed by the servant of defendant, at a restaurant in St. Louis of which defendant acted as proprietor, by the direction of defendant, during the month of July, 1874;

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that on July 7, 1874, there were sold and delivered to defendant, in the city of St. Louis, six prairie chickens, imported from the State of Kansas; and that on July 8, 1874, two prairie chickens were served to customers in the same restaurant. We think there was evidence enough to support a conviction.

It is urged by defendant that, inasmuch as it appears that these prairie chickens were imported from Kansas, there can be no conviction. But the act in question makes it a penal offense to have prairie chickens in one's possession from February 1st to August 15th, in Missouri, no matter where the birds were caught. It is insisted that, if this be the meaning of the act, it is in violation of the Constitution of the United States; Congress alone having power to regulate commerce among the several States. We see nothing unconstitutional in the act. The game law would be nugatory if, during the prohibited season, game could be imported from the neighboring States. It would be impossible to show, in most instances, where the game was caught. The State of Missouri has as much right to preserve its game as it has to preserve the health of its citizens, and may prohibit the exhibition for sale, within the State, of provisions out of season, without any violation of the Constitution of the United States. So far as we know, this right has never been disputed, and its exercise by the absolute prohibition of the having in possession, or sale, of game within the State limits, during certain periods of the year, is no more an illegal attempt to regulate commerce between the States than would be a city ordinance against selling oysters in July. The judgment of the court below will be affirmed. The other judges concur.

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THE STATE OF MISSOURI, Plaintiff in Error, *v.* THOMAS BOYLE, Defendant in Error.

January 31, 1876.

Where one has been tried and acquitted of a crime, no appeal or writ of error lies on behalf of the State.

ERROR to the St. Louis Court of Criminal Correction.

Dismissed.

M. McKeag, for plaintiff in error.

Martin and *Cady*, for defendant in error.

BAKEWELL, J., delivered the opinion of the court.

It appears from the record that defendant, on the information of one Daniel Currie, was arrested and tried on a charge of petit larceny. He was acquitted. A motion for a new trial was made on behalf of the State, and overruled. A writ of error was sued out of the Supreme Court, and the cause is certified to this court in pursuance of section 19, Article 6, of the Constitution. In this court a motion is filed by the prosecuting witness, Currie, to amend the writ of error by substituting him as plaintiff, on the ground that he, Currie, paid the costs. Mr. Currie seems to have been represented throughout by counsel, and the name of an attorney appears to the remarkable statement and brief filed herein in his behalf as prosecuting witness. As defendant has been tried for the offense of which he was accused, and acquitted, the case does not admit of an appeal on behalf of the State. The writ of error in this cause is dismissed. The other judges concur.

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THE STATE OF MISSOURI, Respondent, v. JOHN STEPTOE, Appellant.

January 31, 1876.

1. The statutory provision that, "when two or more persons are charged with having committed an offense jointly, all concerned shall be included in one indictment," has no application to separate prosecutions not charging joint criminality.
2. Where it is made to appear that the verdict, as recorded, is different in form from the original handed in by the jury, it will be presumed that the alteration was made by direction of the court, with the consent of the jury. Such consent need not be entered on the record.
3. When the only count in an indictment charges robbery in the first degree, it is not necessary for the verdict to specify the degree of the crime committed, unless the jury find it to be inferior to that charged in the indictment.

APPEAL from the St. Louis Criminal Court.

Affirmed.

P. W. Fauntleroy and *James W. Hutchings*, for appellant, cited: State v. Jennings, 36 Mo. 372; State v. Davidson, 38 Mo. 374; State v. Farrar, 38 Mo. 457.

J. C. Normile, Circuit Attorney, for respondent, cited: Wag. Stat. 1107; State v. Matrassey, 47 Mo. 295.

LEWIS, J., delivered the opinion of the court.

The defendant was convicted of robbery in the first degree, upon an indictment against him alone. It appeared from the testimony that the crime was perpetrated by the defendant jointly with one Simon Coen, against whom a separate charge for the same offense was prosecuted in the Court of Criminal Correction. Upon these facts the defendant moved to quash the indictment, under color of the following statutory provision: "When two or more persons are charged with having committed an offense jointly, all concerned shall be included in one indictment." Wag. Stat. 1089, sec. 20. The defendant's interpretation of this statute is manifestly unauthorized. The true intent is that, if in any one proceeding the charge is that two or more

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persons have committed an offense jointly, the indictment must be so framed as to hold all to accountability for the act; and not so as to leave some of them to be prosecuted under a different indictment for the same offense. Thus, if in an indictment it be charged that A and B jointly killed C, it will not do to hold A alone in that indictment responsible for the crime of murder, and in another indictment, which recites the same joint killing, to hold B alone responsible. In the indictment under consideration there was no allegation that the defendant's crime was committed jointly with another person. It is not intended that, where a man is charged solely with the commission of a crime, the prosecution must fail if it appear that in some other court or proceeding another man is charged with having helped him in the perpetration. According to the defendant's interpretation, neither of two joint robbers or murderers could ever be punished if one should chance to escape identification and indictment. The motion to quash was properly overruled.

The verdict, as it appears in the certified transcript, was as follows: "We, the jury, find defendant, John Steptoe, guilty of robbery, and assess his punishment at ten years in the state penitentiary." A certificate of the clerk is appended to the record, stating that the true verdict rendered by the jury and accepted by the court was as follows, *verbatim et literatim:* "We the jury in the case of the State of Missouri against John Steptoe, find the defendant guilty and assess punishment for ten years penitentiary." An agreement between the attorneys is also appended, to the effect that the record is to be considered as amended in conformity with the certificate above mentioned. This agreement appears to have been acknowledged before the clerk, in his office, but is not stated to have been filed as a stipulation of record in this cause. Waiving the irregularity of these entries—which we would be justified in disregarding altogether—we do not perceive that they

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can disturb the sufficiency of the verdict. The paper, as handed in by the jury, may have been informal. But the court had authority to correct it, with the consent of the jury, and, as an irregularity is never to be presumed, we may assume, in the absence of any showing to the contrary, that the formal verdict entered upon the record was so shaped by direction of the court, with the jury's consent. The consent so given was not necessary to be entered on the record. There was but one count in the indictment, and that for robbery in the first degree. It was, therefore, not essential to specify in the verdict the degree of the crime committed. No degree of offense being found inferior to that charged, a general verdict is sufficient for a conviction upon the indictment as framed. *State* v. *Matrassey*, 47 Mo. 295; *State* v. *Shoemaker*, 7 Mo. 177. The other judges concurring, the judgment will be affirmed.

THE STATE OF MISSOURI, Respondent, *v.* JULIAN PICKLES, Appellant.

January 31, 1876.

An indictment contained two counts, charging different statutory offenses. The jury found the defendant guilty under one count only, and assessed a punishment inapplicable to that count, but which might have been applicable to the other. *Held*, a ground for reversal, with directions to the court below to proceed as required by the statute in such cases.

APPEAL from the St. Louis Criminal Court.

Reversed and remanded.

Johnson and *Cornwall*, for appellant.

J. C. Normile, Circuit Attorney, for respondent.

LEWIS, J., delivered the opinion of the court.

The defendant was indicted, with two others, for a felonious assault. The only exception saved during the trial was to the instructions given by the court. No brief is

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filed for the appellant, and, so far as we can discover, the instructions are without fault. The indictment contained several counts, all of which were abandoned by the State except the two first. Of these the first was for assault with intent to kill, under section 29, p. 449, Wagner's Statutes; and the second was for wounding, disfiguring, etc., under section 33, p. 450. The punishment prescribed for the first of these offenses is exclusively imprisonment in the penitentiary for not exceeding ten years. For the second it may be assessed at fine and imprisonment in the county jail. The court, in its instructions, clearly set the law to this effect before the jury. The verdict was in the following words:

"We, the jury in the above case, find the defendant guilty of an assault to kill, as charged in said indictment, and assess his punishment at a fine of one hundred dollars and one year's imprisonment in the county jail."

This was clearly a conviction on the first count in the indictment, and an acquittal on the second. Yet the jury assessed a punishment which was not admissible for the offense charged in the first count, and could only attach to the crime of which the defendant was acquitted. This is error manifest on the face of the record.

The statute provides a corrective for such cases, to be applied by the trial court. As this was not done, the judgment must be reversed and the cause remanded for proper proceedings in the court below. The other judges concur.

THE STATE OF MISSOURI, Respondent, *v.* WILLIAM MORGAN, Appellant.

February 14, 1876.

1. Where evidence requiring a formal foundation was introduced without such foundation, no objection on that account having been made at the

time by the opposing party, and it is apparent from the circumstances that the foundation could readily have been laid, no objection because of its omission can be presented in the appellate court.

2. If testimony be offered in a form, or for a purpose, which would make it inadmissible, the court is warranted in rejecting it, although part of it might be admissible for a different purpose. The party offering must disincumber the evidence of illegal matter, and confine himself to that which is legal; otherwise, the whole should be excluded.

3. When it is proposed to impeach a witness, by showing former statements inconsistent with his testimony on a matter relevant to the issue, his attention must be called with particularity to the supposed former statement.

4. Upon a motion, supported by affidavits and opposed by counter-affidavits, for a new trial, on the ground of misconduct of the officers of the court, which, if it existed at all, must have been witnessed by the judge, great weight will be attached in the appellate court to the decision of the court below. In such cases the latter is almost the final arbiter.

APPEAL from the St. Louis Criminal Court.

Affirmed.

S. D. McCormack, for appellant, cited: State *v.* Shields, 13 Mo. 236; Day *v.* State, 13 Mo. 422; State *v.* White, 35 Mo. 500; Deer *v.* State, 14 Mo. 348; State *v.* Boswell, 2 Dev. 209; McComb *v.* State of Ohio, 8 Ohio St. 643; Ros. on Cr. Ev. sec. 716; 1 Ph. on Ev., sec. 762; Evans *v.* Smith, 5 Mon. 363; Peck *v.* State, 2 Humph. 78; Miller *v.* The People, 39 Ill. 459; State *v.* Merrell, 2 Dev. 269; State *v.* Dominique, 30 Mo. 585; McMillen *v.* State, 13 Mo. 30; McDaniels v. State, 8 Smed. & M. 401; People *v.* Greene, 1 Park. (N. Y.) Cr. 11; People *v.* Knickerbocker, 1 Park. (N. Y.) Cr. 302; Hill *v.* Commonwealth, 2 Gratt. (Va.) 594; Smith *v.* State, 9 Humph. 9; Montgomery *v.* State, 11 Stan. (O.) 424; State *v.* Mansfield, 41 Mo. 470; State *v.* Bird, 1 Mo. 585; Davis *v.* State, 2 Humph. 439; State *v.* Jones, 2 Bay (S. C.), 520; Keither v. State, 10 Smed. & M. 192; Cochran *v.* State, 7 Humph. 544; State *v.* Connell, 49 Mo. 282; State *v.* Sims, Dudley (Ga.), 213; State *v.* Sartor, 2 Strobh. (S. C.) 60; United States *v.* Duval, Gilp. 356; State *v.* Hammond, 5 Strobh. (S. C.) 91; State *v.* Packwood, 26 Mo. 340; Copeland *v.* State, 7 Humph. 479; State *v.* Cruise, 16 Mo. 391; Gray-

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son *v.* Commonwealth, 7 Gratt. (Va.) 613; State *v.* Lyon, 12 Conn. 487; State *v.* Fisher, 2 Nott & M. (S. C.) 261; State *v.* Prescott, 7 N. H. 287; Berry *v.* State of Georgia, 10 Ga. 511; 3 Whart. Cr. Law, secs. 3157–3160; State *v.* Hascall, 6 N. H. 353; Yoe *v.* People, 49 Ill. 410; Witehum *v.* State, 11 Ga. 615; Fuller *v.* Scott, Whart. Dig. 355; McLean *v.* State, 8 Mo. 153; Weber *v.* State, 22 Mo. 321; McKinney *v.* The People, 2 Gilm. (Ill.) 541; Gibbons *v.* The People, 23 Ill. 518; Bolls *v.* State of Mississippi, 13 Smed. & M. 398; Hale *v.* State, 4 How. (Miss.) 187; Commonwealth *v.* Wormly, 8 Gratt. (Va.) 712; McLain *v.* State, 10 Yerg. 241; Perkins *v.* Knight, 3 N. H. 474; McCann *v.* State, 9 Smed. & M. 465; Kirk v. State of Ohio, 14 Ohio, 511; Jumpertz *v.* The People, 21 Ill. 409.

W. F. Rogers, for appellant, cited: 1 Greenl. on Ev., sec. 158; Smith *v.* State, 9 Humph. 9; 2 Stark. on Ev. 460; State *v.* Shields, 13 Mo. 236; Deer *v.* State, 14 Mo. 348; Norris *v.* State, 16 Ala. 776; State *v.* Cushing, 29 Mo. 215; Fisher *v.* People, 23 Ill. 283; Hobbs *v.* People, 31 Ill. 385; State *v.* Felter, 25 Iowa, 67; Stevens *v.* State, 31 Ind. 485; McFarland's Case, 8 Abb. Pr. (U. S.) 69; Harris' Case, 22 Am. Jour. Insanity, 334; Commonwealth *v.* Haskell, 2 Brews. (Pa.) 491; Smith *v.* Commonwealth, 1 Duv. (Ky.) 224; State *v.* Pike, 49 N. H. 399; Ray's Med. Jur., sec. 44; Hines *v.* State, 8 Humph. 597; Berry *v.* State, 10 Ga. 511; 1 Park. (N. Y.) Cr. 256.

J. C. Normile, Circuit Attorney, for respondent, cited: People *v.* Sanchez, 4 Park. (N. Y.) Cr. 555, 556; State *v.* Klinger, 46 Mo. 220; People *v.* Thurston, 2 Park. (N. Y.) Cr. 49; State *v.* Holme, 54 Mo. 164; State *v.* Hundley, 46 Mo. 417; State *v.* Connell, 49 Mo. 282; State *v.* Cook, 58 Mo. 545; State *v.* Floyd, 15 Mo. 349; State *v.* Smith, 31 Mo. 566; Beale *v.* Cullum, 31 Mo. 258; State *v.* Dunn, 18 Mo. 419; State *v.* Crawford, 34 Mo. 200; State *v.* Smith, 53 Mo. 267.

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Gantt, P. J., delivered the opinion of the court.

William Morgan was convicted of the murder of his wife, at the March term, 1875, of the St. Louis Criminal Court. Several exceptions were saved at the trial to the admission and exclusion of evidence, and some objections are urged in this court in respect of which no exception was saved. We enumerate them in their order.

1. Mrs. Rose, a sister of the deceased, was examined by the State, and among other things, speaking of her sister, she said: "She stated, just before her death, 'Morgan has stabbed me; what will become of our child?'" No objection was made to this evidence at the time. A point is made on it in this court.

2. On cross-examination of Mrs. Rose, defendant's counsel "offered to prove by her that deceased and herself left their homes, procured a house on Fifteenth street, and were keeping, under assumed names, an open and notorious house of prostitution, and that defendant's infant daughter, contrary to his wishes and without his knowledge or consent, was kept by her mother in said house; that this testimony was sought to be introduced for the double purpose of affecting the credibility of the witness and also as having a tendency to affect defendant's mind; the facts of the prostitution of deceased and witness having been brought to his knowledge by a discovery of their whereabouts." The court refused this offer and defendant's counsel excepted.

3. Defendant's counsel asked the following questions, which the court excluded, defendant excepting:

"What business, if any, were you and Mrs. Morgan engaged in while you resided at the house on Fifteenth street, and what was the business of Mrs. Mills, and were you not engaged in the business of prostitution, and how long did yourself, Mrs. Morgan, and Mrs. Mills continue in such business at that house?

"Did not Mrs. Morgan, the deceased, abandon her husband, and was she not at the time of her death, and for

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weeks previous, in an open and notorious state of adultery with one Stevens, the man in whose company she was on the day of the alleged homicide, and were she and said Stevens, at the time of said homicide, not engaged in purchasing second-hand furniture for the purpose of furnishing a house of prostitution to be kept by Stevens and deceased?"

4. Counsel for defendant sought to show by witness that there was a conspiracy formed between witness, Mrs. Morgan (the deceased), and said Stevens, and other persons of immoral character, to defraud defendant of his property and to prevent him from recovering possession of his infant daughter, aged eleven years, who was then in the custody of said parties, and by them kept in a house of prostitution. The court excluded such evidence, and defendant excepted.

5. In the course of Mrs. Rose's examination-in-chief, she stated, without objection, referring to her sister: "She had made application for a divorce." After the close of her examination the circuit attorney made an effort to show that a petition for a divorce had been filed by Mrs. Morgan in the St. Louis Circuit Court. The defendant objected to this for irrelevancy. The court overruled the objection, and defendant excepted. It does not appear that the circuit attorney followed up his offer and gave any such evidence.

6. Defendant offered to prove by one of his own witnesses "that Mrs. Morgan, Mrs. Rose, and Stevens had been to her house a short time, four or five days, before the homicide; that they seized hold of Morgan, the defendant, and, in his efforts to escape from them, tore a good portion of his clothes from his person; that he fled from them in great terror, and that the effect of said assault upon the defendant was to greatly aggravate his afflicted condition." The court refused this offer, defendant excepting.

7. By another witness he offered to prove "that Mrs. Rose and Mrs. Morgan were prostitutes, and were keeping a house of prostitution on Fifteenth street, in connection with

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other lewd women and persons of immoral character; that they had defendant's child in their custody, and were conspiring against the life of the defendant." The court refused this offer, defendant excepting.

8. By another witness defendant offered to prove "that the statements made by Mrs. Rose, on the stand, in regard to her conversations at Mr. Rogers' office, on those occasions, were false in every particular." The court excluded this evidence, defendant excepting.

9. Dr. C. H. Hughes, a physician, having testified that he had been present in court during the whole trial, except while the two first witnesses testified, was asked, "as a medical expert," to state his opinion in regard to the sanity of the defendant during the month of July, 1874, and about the time of the alleged homicide." The court refused to allow the question in that form, and directed the defendant counsel to ask the witness a hypothetical question, reduced to writing. The defendant excepted, and asked for an hour in which to prepare such a hypothetical question. The court refused to allow more than half an hour; and defendant again excepted. But the court, in point of fact, allowed his counsel two hours for this purpose. The hypothetical question was prepared, and the expert was examined upon it at length.

10. The evidence being closed, the court gave a series of instructions, to which defendant excepted, and defendant asked five instructions which the court refused, defendant excepting.

11. The jury having found a verdict of guilty of murder in the first degree, defendant's counsel filed a motion for a new trial, assigning as reasons for it:

1. The admission of improper evidence.
2. The exclusion of proper evidence.
3. The giving of improper instructions.
4. The refusal of proper instructions.
5. That the verdict was against evidence.

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6. That the circuit attorney was guilty of misbehavior.

7. That the court was guilty of misbehavior.

Affidavits were filed in support of the two last reasons.

1. We consider the first point made untenable. If defendant wished to exclude this statement of deceased, on the ground that a foundation had not been laid for the introduction of a dying declaration, he should have interposed an objection, or moved to strike it out until such a foundation was laid. But the words used seem to render such formal evidence unnecessary. They plainly indicate the anxiety felt by a parent as to her child, about to be left an orphan. It seems wholly unnecessary to accumulate evidence to show that she considered herself on the point of death. Obviously there would have been no difficulty in making such proof, and the failure to object concedes this; besides, the only effect of this statement of Mrs. Morgan was to connect Morgan with the killing. The record shows that this had been already proved in the most unequivocal manner by several eye-witnesses of the deed. It had been committed in open day, in one of the most public places of the city, and before many spectators. The agency of Morgan in causing the death of deceased was not denied, and certainly was not open to denial.

2. We also consider the second point untenable. If the counsel for defendant had confined his question to showing that the witness was unchaste, he might have asked it for the purpose of discrediting her. *State of Missouri* v. *Shields*, 13 Mo. 236. But, clearly, the scope of the offer made was much wider. It sought to involve the deceased as well as to implicate the witness. The offer was made as a whole. We do not think the court was wrong in omitting to inform defendant's counsel that a question directed to part of what they proposed would be permitted. The accused was represented by able and zealous advocates, who must be presumed to have known that a question directed to a single point, and for a single purpose, would

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have a different reception. What they offered to prove was a mass of facts directed to two purposes. One of the purposes was wholly illegitimate, and the greater part of the facts was unsuited to the accomplishment of the other and legitimate purpose. By the persistent effort made to accomplish the purpose forbidden by the law, and the omission to attempt otherwise to prove matters tending to accomplish the lawful purpose, we are forced to infer that the former was the principal aim of the defendant's counsel. The offer, as made, was liable to objection—was inadmissible; when the court so declared, no attempt was made to modify it, and until this was done the court was justified in rejecting the offer.

3. The two questions proposed were the means by which, if his offer had been allowed, the defendant proposed to make it good. They are, for the reasons already given, inadmissible. No doubt can, we think, exist that their form and structure demonstrate the principal object which defendant's counsel sought to accomplish by putting them.

4. The court rightly excluded evidence of a conspiracy between Mrs. Rose, the deceased, and others for the purpose supposed by the counsel for the defendant. This could have been admissible for no purpose desirable for the prisoner. If such a state of things had existed, and had come to the knowledge of the prisoner, its only effect would have been to irritate him and cause him to entertain feelings of resentment towards those engaged in it. If the State had offered this evidence, in order to impute malice to the accused, it might have been relevant.

5. After Mrs. Rose had been questioned as to what she had said to Mrs. Jewell on the day when this case was last continued, the counsel for defendant examined several witnesses for the purpose of contradicting what she had said, on the stand, of what passed on that occasion. This was done without objection on the part of the State. But defendant's counsel offered further to prove "that the state-

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ments made by Mrs. Rose, on the stand, in regard to her conversation at Mr. Rogers' office, on those occasions, were false in every particular." The State objected, and the court excluded this evidence, defendant excepting.

The court acted properly. The record is wholly silent respecting any "statements made by Mrs. Rose in regard to her conversations at Mr. Rogers' office." It is useless to attempt to account for this omission. Whether the defendant's counsel was mistaken in supposing that any such statements were made, we need not determine. It is enough that on this head the record shows no error. Nothing is better settled than that, if the object be to discredit a witness, by showing that a former statement by him, on a matter relevant to the issue, differs from what he said on the same subject on the stand, the attention of the witness must be called with all particularity to the supposed former statement. If the matter inquired of be not relevant to the issue, the examiner is concluded by the answer which the witness makes. We have no means here of knowing what Mrs. Rose said of what occurred at the office of Mr. Rogers, and, of course, we cannot say whether or not it was relevant to the issues in this cause. The court properly refused the proposed offer.

6. In the course of her examination-in-chief, Mrs. Rose testified that her sister "had made application for a divorce." No objection was made to this. When Mrs. Rose was dismissed, the circuit attorney offered to show that the deceased had filed a petition for a divorce in the St. Louis Circuit Court. The defendant's counsel objected to this for irrelevancy. The court overruled his objection, and he excepted. It does not appear, however, that the circuit attorney gave the evidence the objection to which the court overruled.

The fact was already before the jury without objection, and we see no objection to it that would in any point of view warrant the disturbance of this judgment. Either the

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matter was harmless, or (and we incline to this opinion) its tendency was to show that the prisoner's right to meddle with his wife was not that which ordinarily results from the marriage relation. It was, we think, unnecessary to make proof of this fact; but, whether it was proved or not (and the record does not inform us), its admission was not error.

7. The defendant's counsel wished to show that an encounter of a disagreeable kind had taken place, four or five days before the homicide, between the prisoner and his wife, Mrs. Rose, and Stevens

The Criminal Court refused to permit this, and defendant excepted. We are at a loss to understand the theory on which the defendant's counsel complain of this refusal. There was certainly no error in it.

8. The Criminal Court made the proper direction as to the examination of Dr. Hughes. The objection that the court refused to allow more than half an hour for the preparation of the hypothetical question to be put to this medical expert surely falls when, as we see by the record, the court gave defendant's counsel *two* hours, which is twice as much time as they asked for. It is but just to the defendant's counsel to remark that, though this objection was made below, it is not pressed by them in this court, but it is prominently mentioned in the affidavit of Dr. Hughes, to be presently mentioned.

9. The first two reasons assigned in the motion for a new trial have been already disposed of. As to the third, we think it sufficient to say that the instructions given by the court appear to us unexceptionable, and that the counsel for the accused have not pointed out any error in them. We perceive none.

10. The instructions refused are plainly erroneous. We do not analyze them in detail, because to do so would force us to repeat much that has been already said, and because no point has been made on any of them in argument before us.

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11. We are compelled to regard the assignment of the fifth reason in the motion for a new trial as a signal illustration of the degree to which advocacy may blind the judgment. No impartial person, we think, can read this record without being satisfied that on July 27, 1874, William Morgan, the prisoner, stabbed his wife repeatedly, and with every circumstance tending to show premeditation and malice, in a very public place in the city of St. Louis, in the presence of many spectators. We do not care to dwell upon the sickening details; but they force us to one of two conclusions: Either the man was a maniac, bereft of reason and unconscious of what he did, or he was guilty of brutal and revolting murder. His able counsel saw this dilemma plainly, and interposed the defense of insanity. After a patient hearing of all the evidence on this subject, the court submitted it to the jury, with instructions which are not seriously criticised. The jury regarded the evidence as wholly insufficient to sustain the theory of the defense; and we entirely agree with the jury in their conclusion. It is almost an affront to the understanding to be told that, in the case shown by this bill of exceptions, the homicide was committed by a person unable, through mental disorder, to distinguish between right and wrong.

12. In support of the sixth and seventh reasons for a new trial are filed the affidavits of John M. Wirts, an attorney; C. H. Hughes and S. B. Houts, physicians; Stephen Arnold, L. T. Smith, John Hyde, and W. E. Howe. Mr. Normile filed a counter-affidavit.

We will not quote the contents of these affidavits. They fail entirely, we think, to sustain the motion in aid of which they are filed. They display zeal, bad temper, and want of proper respect for the Criminal Court; and, by the aid of the record and the counter-affidavit of Mr. Normile, we are able to see that both the court and the circuit attorney have been accused without just cause. Whenever these affidavits depart from the style of general denunciation which

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characterizes especially those filed by the medical witnesses, and make charges of any definiteness, they are refuted by the record and Mr. Normile's counter-affidavit. Indeed, the latter goes out of his way to disprove an aspersion for which one of the affiants, on the face of his statement, had nothing but gratuitous suspicion. Dr. Hughes dwells, in his affidavit, on the hardship of the court refusing to defendant's counsel an hour in which to prepare the hypothetical question suggested; but the record shows that the court actually allowed two hours for this purpose, or twice as much as counsel asked for. As this affidavit was made after the verdict, it is clear that Dr. Hughes must have known this.

The matters of these affidavits had all come under the notice of the court at the trial. It had heard and seen all of which they spoke, except some trivial things which are abundantly answered by Mr. Normile's counter-affidavit. The Criminal Court overruled the motion founded on these affidavits, and, in so doing, negatived the existence of the matters therein charged. We attach great weight to this action of the court. In respect of the whole business to which these affidavits refer, the court of first instance is almost the final arbiter. It had a far better opportunity of determining whether the things charged in the affidavits really existed, or were the mere product of heated partisanship, than we can have. No written narrative can convey to an appellate court a picture nearly so truthful and vivid of what occurred at the trial as that which was presented by the actual occurrences. For this reason an appellate court would be very slow to review the action of the Criminal Court in such a matter as that under discussion. To warrant such an interference a very strong case should be shown. In the present instance this is not done. From all that we can see, we remain convinced that the St. Louis Criminal Court on this occasion gave to the accused a full, fair, patient, and impartial trial. No guard erected by the

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law for the protection of innocence was beaten down; no evidence of guilt was admitted except in strict conformity to the law. With the judgment finally given we entirely concur, and, all the judges concurring, order it to be affirmed.

CHRISTOPHER W. SPALDING, Respondent, *v.* PHILIP C. TAYLOR, Appellant.

January 31, 1876.

1. Testimony being properly introduced tending to show that a written contract, absolute on its face, is in fact a mortgage, it is erroneous to instruct the jury to disregard such oral testimony as may tend to vary the terms of the written contract.
2. The interest of a mortgagor of personal property in the hands of the mortgagee is not subject to seizure under execution against the mortgagor.

APPEAL from St. Louis Circuit Court.

Affirmed.

G. Pollard and *D. W. Paul*, for appellant, cited: 1 Pars. on Con. 430; 1 Greenl. on Ev., sec. 285; Nedvidek *v.* Meyer, 46 Mo. 600; Dilworthy *v.* McKilsey, 30 Mo. 149; Fallon *v.* Manning, 35 Mo. 271; Free *v.* Vogel, 40 Mo. 149.

R. S. Voorhis, for respondent, cited: 3 Pars. on Con. 249, and cases referred to in note; Park *v.* Hall, cited by Parsons, 2 Pick. (Mass.) 206; Delnerth *v.* McKeley, 30 Mo. 149; Hill. on New Tr., ch. 8, sec. 32, p. 152; Wallard *v.* Hilliard, 7 Wis. 627; Buckman *v.* Greenleaf, 48 Me. 374.

BAKEWELL, J., delivered the opinion of the court.

This was a proceeding in the nature of replevin under our statute, begun by respondent against appellant, for certain personal property, partly live stock.

The plaintiff, Spalding, had given to one Phillips a bill of sale, sealed and acknowledged, and which was duly recorded, for the property in question. The consideration expressed in the deed is a certificate of stock, but plaintiff was allowed

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to show on the trial that the real consideration was a sixty-day note. The evidence shows that plaintiff was to retain possession of this property until the note was paid; that it was not paid at maturity, and still remained unpaid at the time of trial. That, whilst the property was thus in the possession of plaintiff, as mortgagee, it was levied upon by defendant, sheriff of St. Louis county, at the suit of one A. S. Taylor, as the property of said Phillips. Plaintiff replevied the same out of the hands of the sheriff. In the replevin suit judgment was for defendant, at special term, and, on appeal to general term, that judgment was reversed; from which judgment of general term defendant appeals to this court.

On the trial the court granted the following instruction for defendant:

"The jury will disregard the testimony of the plaintiff in the case in relation to the contract of sale of the property in controversy from him to Phillips, in so far as it tends to vary the effect of the written contract in evidence, if they believe it does so vary the terms of said contract."

This was calculated to mislead the jury. It tells the jury to construe a written contract, and to disregard testimony tending to vary their construction thereof. Testimony tending to show that this bill of sale, though absolute on its face, was a mortgage, was properly admitted on the trial, and the jury could only understand this instruction as a direction to disregard that evidence.

The following instruction was asked by plaintiff, and refused:

"If the jury believe from the evidence that the plaintiff sold, or agreed to sell, the property in question to one Phillips, upon the condition that the plaintiff was to hold the possession of said property as a security until the purchase money for the same was paid, and default was made in the payment of said purchase money, then no such interest in said property passed to said Phillips as gave the

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plaintiff, in the attachment against Phillips, the right to seize said property, and you must find for the plaintiff."

This instruction should have been given. There was evidence to support it, and it states the law correctly.

The interest of the mortgagor of personal property in the hands of the mortgagee is not subject to sale under execution against the mortgagor. *Sexton* v. *Monks*, 16 Mo. 156.

The judgment of the Circuit Court at general term, reversing the judgment at special term and remanding the case, is affirmed. The other judges concur.

MECHANICS' SAVINGS INSTITUTION, Defendant in Error, *v.* JOHN FINN, Plaintiff in Error.

January 31, 1876.

In a suit to charge the indorser of a promissory note, an allegation that plaintiff had notice of demand and protest is sufficient to warrant the introduction of proof of due notice of demand and refusal to pay by the maker, and is good after verdict.

ERROR to the St. Louis Circuit Court.

Affirmed.

M. Kinealy, for plaintiff in error, cited: Edw. on Bills (2d ed.), 633, 674; Price *v.* McClare, 6 Duer (N. Y.), 544; Bank of Columbia *v.* Lawrence, 1 Pet. 578; Stephenson *v.* Primrose, 8 Port. (Ala.) 155; Granite Bank *v.* Ayers, 16 Peck (Tenn.), 392; Commercial Bank *v.* Strong, 28 Vt. 316.

I. C. Terry, for defendant in error.

BAKEWELL, J., delivered the opinion of the court.

This is a suit on a negotiable promissory note, on which defendant is alleged to have been accommodation indorser, and which was made payable at plaintiff's counter, and was discounted by plaintiff before maturity.

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The petition is inartificially drawn, and alleges that "said note was not paid at maturity, though demanded at the Mechanics' Savings Institution, and the same was protested for non-payment, of which demand and protest defendant had notice." The essential thing to hold the defendant as indorser was that he should have due notice of demand on the maker and refusal by him to pay; protest was entirely unnecessary, and need not be alleged to charge the defendant.

The answer denies every material allegation of the petition, and sets up a special defence, which is traversed in the replication, and as to which there is no attempt at proof. On the trial, defendant objected to the introduction in evidence of the note sued on, on the ground that the petition did not set up facts sufficient to constitute a cause of action in this, that it failed to state that defendant had due notice of demand of payment or refusal by the maker to pay. The objection was overruled and the note admitted.

The protest, with the affidavit of the notary, were then offered in evidence. The certificate of protest set forth demand at the Mechanics' Savings Institution, refusal, protest, and due notice to the parties concerned, in the manner following: "* * * To John Finn, at his place of business, with man in charge (P. O'Connor)."

The plaintiff objected to the introduction of the protest, on the ground that it was incompetent and irrelevant, and failed to set forth any due notice to defendant of demand on the maker and refusal. The objection was overruled.

Plaintiff then introduced as a witness the notary, who swore that, on the day of the maturity of the note, he left a written notice of demand on the maker, and refusal to pay, at the place of business of defendant, Sixth and O'Fallon streets, with Patrick O'Connor, the man in charge; that he believed it was defendant's place of business because his name was over the entrance, and the man

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in charge said Finn's desk was there, and his mail received there. Defendant was then sworn as a witness for plaintiff, and testified that, at the date of the service of notice, he considered the office at Sixth and O'Fallon his place of business, but was not engaged in any business, and had rented out the office to Reilly & Co. He used Daly's store, the office of his attorney, and that office, indifferently.

The court, at the instance of defendant, gave the following instruction: "If, at the maturity of the note sued on, the premises at which the notice of protest was left by the notary was not in the possession of the defendant, that other parties were carrying on business there, that defendant was not then carrying on any business or employment there at that date, but merely went there for letters, or made it a place of resort, then said notice of demand and refusal was insufficient in law to hold defendant liable on said note."

There was a verdict and judgment for defendant. Motions in arrest and for a new trial were overruled, and all exceptions were saved.

A careful pleader would have alleged that "at the date of the maturity of the note he presented the same for payment to the maker thereof, at the Mechanics' Savings Institution, and demanded payment of the same, and payment was refused, of which facts he *then and there* gave *due* notice to defendant." Does the petition, as it stands, warrant the introduction of evidence to prove this essential fact of *due* notice to the indorser?

On the whole, we think it does. It avers that defendant had notice of demand and of protest for non-payment. A notice that is not due and sufficient is no notice at all; and a notice of protest for non-payment is a notice, by implication, of demand and refusal.

Every fact essential to a recovery was fully proved. It would have been far safer and better for the plaintiff to

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have asked leave to amend when the objection was made to the introduction of evidence, but we shall not disturb the verdict. The judgment of the Circuit Court is affirmed. The other judges concur.

SENECA N. TAYLOR, Plaintiff in Error, v. RUFUS S. PEARSON, Defendant in Error.

January 31, 1876.

When part of an answer is stricken out, and enough remains to constitute a substantial defense, the plaintiff cannot have judgment for want of an answer, because the defendant fails to file a new pleading.

ERROR to St. Louis Circuit Court.

Affirmed.

Taylor & Whitney, for plaintiff in error.

Forrist & Dickson, for defendant in error.

LEWIS, J., delivered the opinion of the court.

This was a suit on a promissory note. Plaintiff moved to strike out a part of the answer, and his motion was sustained. No new pleading being filed by defendant, the plaintiff moved for judgment as for want of an answer. This motion was overruled. When the case was called for trial, plaintiff informed the court that he stood upon his motion for judgment, and refused further to proceed. He was thereupon nonsuited, and, after an unsuccessful motion to set aside, appealed to the general term, where the judgment was affirmed.

The answer, after the striking out of the objectionable lines, contained a complete, substantial defense to the action. Plaintiff in error insists that, under section 29, on page 1019, Wagner's Statutes, the defendant was bound, nevertheless, to file a new pleading. We do not so interpret

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the law. The section reads as follows: "When a petition, answer, or reply shall be adjudged insufficient, in the whole or in part, upon demurrer, or the whole or some part thereof be stricken out on motion, the proper party may file a further like pleading within such time as the court shall direct; and, in default thereof, the court shall proceed with the cause in the same manner as if no such original pleading had been filed."

The provision for filing a further pleading is permissive merely. If the party elect to do so, he must file it within the time prescribed by the court; otherwise, the consequences will follow as stated.

If the whole answer be adjudged insufficient, or stricken out on motion, the defendant will have no pleading left, and must either elect to file another or give up his cause. If so much be adjudged insufficient, or stricken out, that no defense appears in what remains, he will be in the same predicament. But if, after the judgment of partial insufficiency, or the striking out, there yet remains a substantial defense, he may well elect to stand upon that. It is still before the court, unaffected by the ruling, and we do not see by what right the court can either disregard it or require the defendant to copy and refile it, word for word, as it already stands.

The rule of the Circuit Court to which our attention is called might be considered if the motion to strike out had been overruled, or if leave had been taken to amend. But, as neither event occurred here, we cannot perceive the application of the rule. The other judges concurring, the judgment must be affirmed.

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JESSE THACKER, Respondent, v. R. G. DUN *et al.*, Appellants.

January 31, 1876.

Defendants collected a note belonging to plaintiff, which had been transmitted to them by an attorney, and applied the proceeds to a debt owing to them by the attorney. This application, though made with the consent of the attorney, was a conversion for which defendants were liable to the plaintiff.

APPEAL from St. Louis Circuit Court.

Affirmed.

Joseph T. Tatum, for appellants, cited: 1 Greenl. on Ev., sec. 577; Pinto v. Santos, 5 Taun. 447; Stephens v. Babcock, 3 B. & Ad. 354; Whitman v. Felton, 28 Mo. 603; Bigelow v. Davis, 16 Barb. (N. Y.) 561; Armstrong v. Smith, 3 Blackf. (Ind.) 251; Indap v. Dyott, 3 Blackf. (Ind.) 324; Benton v. Craig, 2 Mo. 189; Burton v. Collin, 3 Mo. 315; Cockrill v. Kirkpatrick, 9 Mo. 697; Beardslee v. Boyd, 37 Mo. 180.

A. R. Taylor, for respondent, cited: Pope v. Askew, 1 Ired. (N. C.) 16; Doe, *ex dem.* Mudd, v. Suckermore, 5 Ad. & E. 705.

GANTT, P. J., delivered the opinion of the court.

It appears that, in 1866, the defendants Dun & Co. were collecting agents; that Work was their correspondent at Carlinville, Illinois; that plaintiff placed in Work's hands, for collection, a note made by Allen, of Chester, Illinois, in favor of Thacker (plaintiff); that Work sent this note to Dun & Co., at St. Louis; that they sent it to their agent, Watt, at Chester; and that they directed that the future correspondence on the subject of it should be confined to Watt and Work. In April, 1868, Watt collected and remitted to Dun & Co. $550 on account of this note. In the interval, Longman, the agent in St. Louis of Dun & Co., had gone into some private enterprises with Work, in the course of which he had indorsed for him, in the name

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of R. G. Dun & Co., two acceptances, one for $250 and the other for $300, both of which were protested. Longman had been urgent with Work to pay these bills, and when this money was received he applied it to that purpose. Longman says that Work had sanctioned the application, by letters written before the money was collected. He had destroyed these letters. Work denies that he ever directed such an application. His account of it is that "he (Longman) had interfered, and by some means got Watt to send the money through the agency." We quote his language, not because this general statement is a proper mode of proving such interference, but because Work's statement appears by a deposition filed in the cause; and Longman, who was examined orally at the trial, entirely fails to clear up this suspicious circumstance of the remittance to Dun & Co. by their agent Watt, after the latter had received instructions to communicate directly with Work. This certainly needed explanation. Work had charged that it was done by Longman's procurement, and the failure of Longman to notice it at all forces us to resolve all that is doubtful about it against him, and, consequently, against his principals. He was their general agent here. No question is made of the fullness of his authority to sign their name and carry on their business.

Stress is laid, by appellant's counsel, on the evidence tending to show that Longman, in indorsing for Work in aid of the enterprise in which they engaged, was acting merely for Work's accommodation. This is not so clear, but we think it unimportant; and it is also immaterial that this business was of the kind called "a gift enterprise," from which Work testifies that Longman wished his name and that of his principals to be disconnected, but that the share of the expected profits to be received by Longman for his agency was perfectly understood between them. We place our decision on other grounds.

The court gave the following instructions for the plaintiff:

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1. "If the jury believe from the evidence that Dun's Mercantile Agency, of which defendant was a partner, received from Work, attorney of plaintiff, a note, the property of plaintiff, against one Allen, and that the said agency collected $550 on said claim on 30 of April, 1868, and further find that said agency refused to pay said sum at the time of the collection, or at any time since, then the jury should find for the plaintiff the sum of $550, with interest from the time of such refusal to pay.

2. "The court declares the law to be that, if the agency of Dun & Co. received plaintiff's claim for collection, and received thereon the sum of $550, defendant could not apply plaintiff's money to the payment of a draft on which defendant's name was indorsed, even if so directed by Work, plaintiff's attorney.

3. "The court declares the law to be that, if Work, as attorney of plaintiff, sent a note through defendant's agency for collection, and said agency received $550 thereon about April 30, 1868, and then refused to pay over the same, plaintiff is entitled to recover of defendant $550, and interest from said April 30, 1868."

The defendant asked several instructions.

1. The first was a general demurrer to the evidence.

2. The second declared that defendants had the right to appropriate the money received on the claim, which was under Work's control, to the payment of Work's acceptance, indorsed by defendants for his accommodation.

3. The third declared that, if defendants were led to believe that Work "owned or controlled" the claim against Allen, defendants were justified in treating it as Work's property.

4. That the payment of the money to defendants by Watt was equivalent to a payment to Work, and that, therefore, plaintiff could not recover.

5. The fifth instruction stated the facts supposed to be

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shown by the evidence, and deduced the conclusion that plaintiff could not recover.

All of these instructions the court refused, defendants duly excepting.

1. We think the case a very plain one. The only error we perceive in the record is not one of law, but of fact. We do not understand how it was that the verdict was for only $580. This is much less than $550 and more than five years' interest, such as the triers of the fact were directed by the third instruction to give to the plaintiff. But this is not an error of which we can take any cognizance. There was, in fact, no positive evidence of a demand prior to the bringing of the suit; but there was evidence of a conversion of the fund as early as April, 1868. We entirely approve of the instructions given for the plaintiff.

2. None of the instructions refused embodied a correct legal principal. The first need not be noticed. The second declared that the party having "control" of a claim was entitled to apply to his own use the proceeds of it. The third, that if defendants were "led to believe" (by whom? by plaintiff or by some third person?) that Work "owned or controlled" the claim, then, etc. The fourth, that payment to Dun & Co. was equivalent to payment to Work; therefore, etc. Now, for some purposes it was equivalent. So far as Watt was concerned, it was the same thing. If the money had come to the hands of Work, he being in St. Louis, and he had, with the knowledge of Dun & Co., appropriated it to the payment of the bills indorsed by them, we think that they could not have justified such a misapplication of the fund, but would have been answerable to plaintiff as for money received to his use. Such, however, is not the case here; and very clearly this instruction is not law. The fifth instruction has been considered in our dealing with the second, third, and fourth.

The questions presented by this record are not of difficult

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solution by any means; but we take occasion to say that the utmost good faith is demanded from all persons occupying, towards the owner of a claim, the relations which Work, Watt, and Dun & Co. occupied towards Thacker. By no juggle could any of them escape from liability to be charged as agent of the plaintiff, or so contrive it that any of them should be at liberty to treat any of the others as owner of the claim, and to appropriate it to his own use. To permit this would be to allow one of several bailees to commit a breach of trust to the advantage both of his co-bailee and himself—all of them having notice of the trust, and necessarily, therefore, of the breach of it. It is not to be seriously contended here that Dun & Co. supposed that Work could appropriate this money except by being faithless to the plaintiff. We think it proper to add that we see no reason to charge any such intention on Work, and that Mr. Watt is entirely unconnected with any impropriety in this matter.

We order the judgment to be affirmed, with 10 per cent. damages. All the judges concur.

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ALFRED M. WATERMAN, Appellant, v. THOMAS A. BUCKLAND, Respondent.

January 31, 1876.

1. Courts of justice will not sit to determine wagers, or to compel parties to pay their bets.
2. What is usually called "an option contract" is a wager.

APPEAL from St. Louis Circuit Court.

Affirmed.

John N. Straat, for appellant, cited: Good v. Elliott, 3 Durnf. & E. 693; Morgan v. Pebror, 3 Bing. 447; Hibblewhite v. McMorine, 5 Mee. & W. 462; Johnson v. Fall, 6 Cal. 359; Kirkland v. Randon, 8 Texas, 10; Bass v.

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Peevey, 22 Texas, 295; 4 Zab. (N. J.) 576; 5 Harr. 347; Moran *v.* Pettis, 3 Scam. (Ill.) 592; Chitty on Con. 418 (ed. of 1848); 3 Scam. (Ill.) 529; 6 Cal. 359.

A. R. Taylor, for respondent, cited: Hickman *v.* Benson, 8 Mo. 8; Hayden *v.* Little, 35 Mo. 422; Pittz *v.* Long, 40 Mo. 537; Hook *v.* Turner, 22 Mo. 333; Moxton *v.* Gheen, 75 Penn. St. 166; Kirkpatrick *v.* Bonsall, 72 Penn. St. 168; Gram *v.* Stebbins, 6 Paige, N. Y. 124.

GANTT, P. J., delivered the opinion of the court.

From the record it appears that, on January 29, 1869, plaintiff and defendant made a wager respecting the rise and fall in the market of mess pork. The speculation covered the period of ninety days; each party placed his memorandum check in the hands of a stake-holder for $1,000. What was called a settlement was to be made at the end of ninety days. The quantity of pork, the rise or fall in the price of which was at risk, was 1,000 barrels. The transaction was called an "option sale." Waterman purported to be the vendor, and Buckland purchaser, of the pork. It was agreed that if, at the end of ninety days, the price had fallen from what it was on the date of the transaction, Waterman should receive the difference from Buckland. If it had risen, he was to pay the difference to Buckland. It was averred that it had fallen, and Waterman claimed $500 as the difference in price. It was alleged that Buckland had refused to pay this sum, and the Circuit Court was asked to determine that he had lost his wager, and to enforce its payment. The Circuit Court sustained a demurrer to the petition on the ground that the contract disclosed by it was illegal and void as being contrary to public policy. The plaintiff appealed to this court, and argues here that courts in England have repeatedly sustained actions to recover money won in a wager; that in this country such actions have been upheld in some of the states; that the statutes of Missouri do not condemn wagers of the kind shown in the petition, and that the matter about which the

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parties made their wager is not one inquiry into which is indecent or immoral.

1. We are not influenced by the long series of decisions in England upholding actions on wager contracts. They have never been regarded as good precedents in Missouri. They were so well established, however, in the mother country, that it was thought expedient to destroy their authority by an act of Parliament; and this was accordingly done, early in the reign of Queen Victoria.

2. As little are we moved by the few instances in which the courts of some of our sister States have tolerated such actions; but we wish to remark here that decisions have been quoted from some of these which have been pointedly condemned and overruled by later adjudications. A case supposed to warrant an action to recover money won by wager was cited from the earlier Illinois decisions. The counsel for the respondent refers us to a case in which the supposed authority of that case has been disregarded very recently by the United States Circuit Court in that State, and since the argument of the case at bar. We learn, through the press, that a decision recently made by the Supreme Court of the State of Illinois has completely disposed of "option contracts" in that State, declaring, in substance, that such transactions are not contracts in any proper sense, but mere wagers, which courts of justice will not sit to determine or enforce.

3. While it is true that the wager disclosed in the petition is not one which is punished criminally by the statutes of Missouri, nor even expressly forbidden, we have no doubt that, if the stake-holder had paid over the stake to either party in this matter, the loser could have recovered it back under the provision of chapter 64, Wagner's Statutes (ch. 74, Gen. Stat. of Mo.). Under such circumstances, to invoke the aid of a court to do what the law says the parties themselves shall not do, to any purpose, is an appeal to which no attention is due. It is altogether inadmissible to

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infer that everything is moral which the penal law does not forbid.

4. The courts of Missouri have steadily, from the beginning, discountenanced gaming of all descriptions; have enforced the legal penalties against it, wherever applicable, and have refused to allow an action to be brought to recover money won on wagers, to the making of which no penalty has been annexed by law. *Hayden* v. *Little*, 35 Mo. 418; *Shropshire* v. *Glascock*, 4 Mo. 536; *Hickerson* v. *Benson*, 8 Mo. 8. The Supreme Court, in these cases, has condemned all such transactions as "*contra bonos mores*"—as tending to the demoralization of society.

We concur very heartily with the views entertained by the Supreme Court of Missouri, and, being of opinion that the Circuit Court correctly applied to the case before us the principle indicated by the court of last resort, we order its judgment to be affirmed. All the judges concur.

THE STATE, *ex rel.* THE ATTORNEY GENERAL, Respondent, *v.* GEORGE C. MILLER *et al.*, Appellants.

January 31, 1876.

By an act of the General Assembly, approved January 16, 1833, the trustees of the town of New Franklin were authorized to raise, by lottery, $15,000, for the construction of a railroad from the bank of the Missouri river to the town of New Franklin. By act of February 26, 1835, they were further empowered to contract with any person to have the lottery drawn in any part of the United States, on such terms as they should consider most advantageous. By act of February 8, 1839, the power previously given to raise money for a railroad was withdrawn; the trustees were authorized to apply the funds raised to a macadamized road, and the Governor, on certain preliminary conditions, might, by proclamation, authorize the raising by lottery of a sum sufficient to complete the work, not exceeding $15,000. On November 17, 1840, proclamation was issued by the Governor to that effect. On June 1, 1842, the trustees made an agreement with Walter Gregory, whereby they sold to him "the said lottery and all right to control the same," and appointed him "the sole

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manager and conductor of said lottery or lotteries, for the benefit of the town of New Franklin, under the provisions," etc. Gregory assumed all the risk and expense of the undertaking, and agreed to pay the trustees $15,000, in semi-annual installments of $250 each, beginning with January 1, 1843. A proviso was added whereby $1,100 previously paid to the trustees by other parties should be considered as payments made by Gregory on his said purchase. On April 11, 1849, the board of trustees entered on its minutes a memorandum of an agreement that, in consideration of $500 paid by Gregory, in addition to the $1,100 acknowledged by the contract of June 1, 1842, he was released from all further payments under said contract until July 15, 1851—the semi-annual installments of $250 then to commence, and to continue until the further sum of $13,400 should be fully paid, making, in all, $15,000. This memorandum purports to be signed and sealed by the trustees, but is not executed by Gregory. By act of December 6, 1855, "all contracts made by the said trustees for the purpose of raising the amount of money authorized to be raised" by the several acts above recited, "for the purpose of constructing a rail or macadamized road," etc., were declared to be legal, and the same might be carried out according to the true intent of the parties thereto. No part of the money raised by the lottery was ever applied to the making of a road of any kind. By an information in the nature of *quo warranto*, on the relation of the Attorney General, filed in the St. Louis Circuit Court, on the —— day of ———, 1875, the defendants, as assignees of Gregory, were required to show their authority for selling lottery tickets in Missouri. Judgment of ouster was rendered in the Circuit Court. It was *held* that the Circuit Court had jurisdiction of the controversy.

Held (BAKEWELL, J., dissenting), that the judgment of ouster was proper, and must be affirmed.

Per GANTT, P. J.—1. At any time prior to 1865 it was competent for the Legislature to either legalize or forbid the selling of lottery tickets, unless, by a contract with some person or persons, the power of prohibition was so far withdrawn. A right to sell, so vested by contract, could not be interfered with by general penal statutes against lotteries, or by any other instrumentality of the State governments.

2. The contract of June 1, 1842, must, in the light of its repeated sanctions by the Supreme Court, be considered unimpeachable. But, that contract having expired in 1870, by completion of the period which it covered, no one could have, under the acts of 1833 and 1835, and the contract of 1842, a right to sell lottery tickets in Missouri.

3. The contract of April 11, 1849, under which it is claimed that the privileges conferred on Gregory were extended in point of time, being wholly without consideration as to the trustees of New Franklin; being, in fact, a surrender of rights held under the former contract without compensation derived, or corresponding advantage of any sort; and being, not in furtherance of the objects contemplated by the act of 1833, but manifestly in

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hindrance of them, was null and void. The act of December 6, 1855, gives it no support.

4. Although a seal, or a scroll by way of seal, imports a consideration, no presumption arises of a consideration different from that which is ascertained by the instrument itself; and if the declared consideration be illegal or worthless, while, in some cases, another may be proved, yet there is no legal presumption of the existence of such other consideration.

5. *Quære*, whether persons acting in a representative capactity can, by affixing a scroll to their signatures, shut the door upon an inquiry by their principals into the reasons for their action.

6. Even if the memorandum of April 11, 1849, were a binding contract, its operation would only be to extend the time within which Gregory was to make his payments, and to diminish, by loss of interest, the price of his purchase. It could not be understood as enlarging the privileges previously acquired by him, or that any such enlargement should be in precise proportion to his own failure of performance of the original contract.

7. Ever since 1870, when the last payment was due under the contract of June 1, 1842, the defendants have been without the protection of any contract to justify their selling lottery tickets in violation of the general law. Hence, the judgment of ouster was proper, and ought to be affirmed.

Per Lewis, J.—1. The contract of April 11, 1849, cannot be treated as a nullity in this proceeding. The State, by act of December 6, 1855, declared it to be legal, and gave her assent to its being carried out according to the intent of the parties.

2. The proceeding by information in the nature of *quo warranto* was a part of the common law, and so introduced into Missouri. The statute of Anne, and the corresponding statute of this State, in authorizing a private relator, did not take away the right of the government to appear by its law officer, as relator, in a common law court of original jurisdiction.

3. A municipal charter is a delegation of the State's sovereignty for local purposes, and is, in general, not judicially forfeitable, like a private franchise. But when to such a grant is added a special franchise, independent of the local government and operative beyond its limits, the latter is liable to forfeiture for non-user, misuser, or breach of condition. The lottery privilege granted to the corporation of New Franklin was such a franchise, and is shown to have been forfeited in every mode possible for the case.

4. The defendants and Gregory, their assignor, took the franchise subject to all the conditions, including the liability to forfeiture for certain causes. A judgment of forfeiture against them for such cause would not impair the obligation of their contract, but would simply enforce its terms.

5. The authority given the trustees to contract on such terms as they should "consider most advantageous," did not imply a right to create terms which would be in derogation of law.

6. The judgment of ouster was proper, for forfeiture of the franchise by failure of the conditions upon which it was granted.

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Per BAKEWELL, J., dissenting.—1. The contract of April 11, 1849, whether legal or not upon general considerations, was validated by the act of December 6, 1855.

2. Consideration is not of the essence of a contract, though necessary to support one. A contract under seal needs no consideration, and is binding between the parties, not only without a consideration, but even when, as in this case, one is set out and appears to be no consideration at all, because already past.

3. A contract or agreement is where a promise is made on one side and assented to on the other.

4. The general laws of 1836 and 1842, prohibiting lotteries, were inoperative as to the Missouri lottery, that being expressly authorized by the same power which uttered the prohibition. The prohibitory act of 1845 cannot be set up against the contract of 1849, because the latter was ratified and validated by the act of December 6, 1855. This ratification and validation did not constitute a law retrospective in its operation, within the meaning of the Constitution.

5. The lottery franchise could not be forfeited by any act of the trustees of New Franklin, after they had sold it to another. A judgment of forfeiture would impair the obligation of their contract of sale, which was made by authority from the State, and ratified by the same power.

6. The contract of 1849 having been in full force before the constitutional prohibition of 1865 against lotteries, no subsequent constitutional ordinance, or law, or decision of any court could impair its validity, and it is valid now.

7. Gregory and his assigns could not control the application by the trustees of the funds raised from the lottery, and, therefore, cannot be held responsible for any misappropriation of them after the transfer. The defendants cannot be deprived of their franchise because of such misappropriation; since that would be to assume that the Legislature gave to the trustees a right to make a sale which would be revocable at the legislative will.

8. Courts of justice cannot undertake to annul any legislation, within the constitutional authority of the General Assembly, for apparent rashness or improvidence in the enactment.

9. The Circuit Court had jurisdiction of this proceeding. It was never intended by the statute to limit the common law jurisdiction of the Circuit Court over *ex-officio* informations in the nature of *quo warranto*.

10. The judgment of ouster was improperly rendered, and ought to be reversed.

APPEAL from the St. Louis Circuit Court.

Affirmed, BAKEWELL, J., *dissenting*.

D. T. Jewett, for appellants, cited: Hequembourg *v.* Lawrence, 38 Mo. 555; McElhinny *v.* Stewart, 32 Mo. 379;

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State *ex rel.* *v.* McBride, 4 Mo. 303; Attorney General *v.* Ins. Co., 8 Mo. 330; Douglas *v.* Scott, 17 Mo. 521; State *ex rel.* *v.* Stone, 25 Mo. 555; State *ex rel.* *v.* Lingo, 26 Mo. 496; Attorney General *v.* McAdoo, 36 Mo. 45; State *v.* Bernoudy, 36 Mo. 279; Attorney General *v.* Woodson, 41 Mo. 227; State *ex rel.* *v.* Straat, 41 Mo. 58; State *ex rel.* *v.* Buskirt, 41 Mo. 111; Attorney General *v.* Pool, 41 Mo. 32; Attorney General *v.* Vallé (Water Board), 41 Mo. 29; Attorney General *v.* Morrison, 41 Mo. 238; Attorney General *v.* Churchill, 41 Mo. 41; State *ex rel.* *v.* Sherman, 42 Mo. 210; State *ex rel.* *v.* Kupferle, 44 Mo. 154; Attorney General *v.* Pearcy, 44 Mo. 159; Attorney General *v.* Steers, 44 Mo. 223; State *ex rel.* *v.* Fitzgerald, 44 Mo. 425; State *ex rel.* *v.* Adams, 44 Mo. 570; Attorney General *v.* Bishop, 44 Mo. 229; Attorney General *v.* Conrades, 45 Mo. 45; Attorney General *v.* Windser, 45 Mo. 346; Attorney General *v.* Boatmen's Savings Inst. 48 Mo. 189; Attorney General *v.* Gilbraith, 48 Mo. 107; State *ex rel.* *v.* Cape Girardeau R. R. Co., 48 Mo. 468; State *ex rel* *v.* Weatherby, 45 Mo. 17; State *ex rel.* *v.* Bond, 46 Mo. 528; Attorney General *v.* Fiala, 47 Mo. 310; State *ex rel.* *v.* Searl, 50 Mo. 268; Attorney General *v.* Vail, 53 Mo. 97; Attorney General *v.* Townsley, 56 Mo. 107; State *ex rel.* *v.* Coffee, 59 Mo. 59; State *v.* West Wisconsin R. R. Co., 34 Wis. 197; State *v.* Hawthorne, 9 Mo. 389; State *v.* Morrow, 12 Mo. 279; State *v.* Morrow, 26 Mo. 131; State *v.* Miller, 50 Mo. 129; Ang. & Ames on Corp., sec. 736, and High, secs. 680, 690; 2 Dill. on Mun. Corp. (2d ed.), sec. 720; Hull *v.* S. R. R. Co., 21 Law Rep. 138; Sturgis *v.* Knapp, 34 Vt. 60.

James O. Broadhead, for appellants, cited: Hamilton *v.* St. Louis County, 15 Mo. 3; Barton County *v.* Watson, 47 Mo. 189; People *v.* Power, 25 Ill. 190; East Hartford *v.* Hartford Bridge Co., 10 How. 533; Dunklin County *v.* District Court, 23 Mo. 449; Reardon *v.* St. Louis County,

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36 Mo. 555; Hannibal & St. Jo. R. R. Co. *v.* Marion County, 31 Mo. 303; Gelpcke *v.* Dubuque, 1 Wall. 266; State *ex rel.* *v.* Cape Girardeau, etc., 48 Mo. 471; State *v.* Miller, 50 Mo. 133.

C. P. Ellerbe, for Police Commissioners, and of counsel for State, cited: Routroug *v.* Wolff, 35 Mo. 174; Hope Mutual Fire Ins. Co. *v.* Flynn, 38 Mo. 483; Fowler *v.* City St. Joseph, 37 Mo. 228; City St. Louis *v.* Clemens, 52 Mo. 144; State *v.* Hawthorne, 9 Mo. 389; State *v.* Morrow, 12 Mo. 289; State *v.* Miller, 50 Mo. 129; 2 Wall. 45; 3 Wall. 377.

John A. Hockaday, Attorney General, and *Frank J. Bowman*, for the State, cited: 16 Me. 224; 6 Cow. 196–211, 217; 4 Wheat. 558, 559; 2 Mo. 169; 5 Mass. 230; 9 Wend. 351; 9 Cranch, 43–51; 2 Mo. 169; 6 Ired. (N. C.) 460–456; 23 Wend. 254–537; 21 Wend. 235; 4 Cush. (Mass.) 60–62; 5 Ired. (N. C.) 309; 20 Penn. 185; 8 Pet. 281; 19 Md. 239; 11 Ala. 472; 16 Mass. 102; Attorney General *v.* Petersburgh & Roanoke R. R. Co., 6 Ired. (N. C.) 456; Attorney General *v.* Washington & Baltimore T. R., 19 Md. 239; State *ex rel.* *v.* Cape Girardeau & St. Louis R. R. Co., 43 Mo. 112; High. on Rem. 440; 32 Mo. 38; 35 Mo. 135; Whittlesey's Pr., title Quo Warranto, and cases there cited; Acts of 1845, p. 723; Acts of 1843, p. 85; Rev. Code of 1835, p. 398; Cooley on Const. Lim., side secs. 91, 92; Dwar. on Stat., 2d note to p. 69, and p. 365; Cooley on Const. Lim. 175; 27 Penn. 456; 44 Mo. 572; 5 Gray (Mass.), 100, Sec. 10 of Art. 14, Const. of 1875.

GANTT, P. J., delivered the opinion of the court.

The State of Missouri, by the Attorney General, filed in the St. Louis Circuit Court an information in the nature of a *quo warranto*, charging that defendants carried on the business of selling lottery tickets in St. Louis, denying the lawfulness of their so doing, and inquiring by what warrant they claimed to do it. The appellants answered that they

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were protected in selling lottery tickets, etc., by force of a contract, dated June 1, 1842, made by authority of the State, between themselves and the trustees of the town of New Franklin, and modified by another contract, made April 11, 1849, transferring to them, the appellants, the lottery franchise given to the trustees of the town of New Franklin by an act of the General Assembly, approved January 16, 1833, and that the period for which they were thus authorized to enjoy this privilege was unexpired.

By section 7 of the act of January 16, 1833, it was declared that the board of trustees of the town of New Franklin should have power * * * "to raise, by lottery, a sum of money, not exceeding $15,000, for the construction of a railroad from the bank of the Missouri river to the town of New Franklin," etc. On February 26, 1835, the board was authorized "to contract with any person to have said lottery drawn in any part of the United States, on such terms as they should consider most advantageous, and that they should have the same privileges as to the sale of the tickets in this State as heretofore, until the amount authorized in said act be raised."

By an act of the General Assembly, approved February 8, 1839, so much of the act of January 16, 1833, as provided that the board of trustees of the town of New Franklin should have power to raise, by lottery, a sum not exceeding $15,000, for the construction of a railroad, etc., was repealed. The board was authorized to apply the funds raised, and to be raised, to the construction of a macadamized road, and it was provided that the governor, on receiving a report from the trustees as to the disposition of the funds already raised, and the work already done, might authorize, by proclamation, the raising, by lottery, of a sum sufficient to complete the work, not exceeding $15,000. On November 17, 1840, the governor issued his proclamation authorizing the board of trustees of the town of New Franklin to raise, by lottery, $15,000. On June 1, 1842,

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an agreement was made between the trustees and Walter Gregory, reciting that the trustees had already contracted with Gray and Eicholtz to raise for them the sum of $15,000. That this agreement had been assigned to Gregory, and was, by consent, abandoned by both parties; and that the trustees sold to Gregory "the said lottery, and all right to control the same," and appointed him "the sole manager and conductor of said lottery or lotteries, for the benefit of the town of New Franklin, under the powers above recited," etc. Gregory assumed all the risk and expense of the undertaking, and agreed to pay to the trustees $15,000, in installments, as follows: $250 on January 1, 1843; $250 on June 1, 1843, and *so on*, paying $250 semi-annually (the two payments given as examples are not at semi-annual intervals), until the sum of $15,000 is fully raised, to the said trustees, provided that $1,000 heretofore paid by Gray and Eicholtz, and $100 paid by Hawthorne, should be considered as payments, in order as made, on the above installments by Gregory. It was further provided that Gregory should not be bound by this agreement in the event of interference by the judiciary, legislative, or executive departments, in which case he should be only bound to pay the installments to the time of the interference. He also reserved to himself the right to abandon the contract at any time, and to assign it at pleasure. He gave approved security in the penal sum of $30,000 for the performance of the contract on his part, as required by the act of February 8, 1835.

On April 11, 1849, the board of trustees, etc., entered on their minutes a memorandum of an agreement that, in consideration of $500 paid by Walter Gregory, in addition to the sum of $1,100 paid on the contract dated June 1, 1842, he was released from all further payments under said contract until July 15, 1851, the same annual installments of $250 then to commence and continue, according to the terms of the contract, "until the further sum of $13,400

should be fully paid, making the sum of $15,000 in all." This memorandum, as set out, purports to be signed and sealed by the trustees. It is not executed by Gregory.

On December 6, 1855 (p. 467 of Session Acts), the General Assembly enacted "that all contracts made by the said trustees for the purpose of raising the amount of money authorized to be raised by the said act of incorporation and the act amendatory thereof, for the purpose of constructing a rail or macadamized road from the bank of the river to the said town, be, and the same are hereby, declared to be legal, and may be carried out according to the true intent and meaning of the parties thereto." The title of this act was: "An act to authorize the trustees of the town of New Franklin to construct a plank road." The first part of the section quoted authorized them to construct a plank road, instead of a rail or macadamized road, "as provided for in an act entitled, etc., approved the 6th of January, 1833, and an act approved the 8th of February, 1839, to amend the first act."

There was evidence of what may, without the least injustice, be termed a total misuser by the trustees of the town of New Franklin of the funds received from Gregory and his assignees.

The appellants, defendants below, claimed that the Circuit Court had no jurisdiction of the information, for want of a private relator. They also claimed that they had, for a term yet unexpired, the privilege of selling lottery tickets in Missouri by virtue of a contract, valid and binding, made by them with the trustees of the town of New Franklin; and that they were unaffected by any misapplication of the funds paid by them to the trustees.

The State insisted that the Circuit Court had jurisdiction of the case; that the contract of 1842 was itself void, as being made in violation of existing laws; that the contract of 1849 had no validity whatever; that it does not profess to have been executed by Gregory; that there is no legal

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evidence that it was executed by the trustees, etc., of New Franklin; that it was destitute of all obligations, for want of any consideration to support it; that the assignees of the lottery franchise are bound to take it *cum onere*, and to see to the fulfillment of the conditions on which it was given to the town of New Franklin; that the so-called contract of 1849, admitting it to be valid and binding so far as to extend the time of payment of the money contemplated and secured by the contract of 1842, did not contemplate, and cannot be presumed to contemplate, that the period during which the lottery franchise was to be enjoyed should be enlarged by the neglect of appellants to pay the price stipulated in 1842 for the enjoyment then ascertained, and that any misapplication of the funds raised, committed by the trustees, would forfeit the privileges of their assignees.

The Circuit Court decided that it had jurisdiction of the information, and gave judgment of ouster against appellants, who bring the matter before us by appeal.

1. The first question, as to the jurisdiction of the Circuit Court, I consider to be settled by the decisions of the Supreme Court of Missouri. *State* ex rel. v. *Stewart*, 32 Mo. 379; *State* ex rel. v. *Cape Girardeau Railroad Co.*, 48 Mo. 468. If the question were an open one, I should be inclined to take the same view; as it is, I do not think it proper to do more than accept the decision of the court of last resort.

2. Much was said at the hearing in this court of the bearing on the question before us of the statute of Missouri which, since 1836, has punished as a misdemeanor the selling of lottery tickets, and of the Constitutions of 1865 and 1875. It was contended that all contracts made between 1836 and 1865, for the sale of lottery tickets in Missouri, were void as being contrary to her penal laws; and that all laws passed since 1865, seeking to legalize lotteries, were void as being contrary to the Constitution of that year.

It is plain enough that, since 1865, the General Assembly

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has had no power to legalize a lottery, or license the sale of lottery tickets in Missouri, but our attention has not been called to any act of the General Assembly, passed since the Constitution of that year took effect, in which such a power is asserted. As to the period before 1865, it cannot be successfully claimed that the General Assembly had not the power to legalize lotteries if so minded, and it also possessed the power of being partial in the permission of this privilege. By virtue of its general power it could at any time make penal this or any other act, not within the prohibitions of the Federal or State Constitution. If at any time it seemed expedient to prohibit by law the selling of lottery tickets and the carrying on of a lottery, it was clearly competent for the General Assembly to do this; but, if the right to do this business had been vested by contract in any person, then the subject was to that extent withdrawn from the general power of the State, and the party having such contract could only be proceeded against under its terms. Accordingly, if there were a valid contract between the appellants and the trustees, etc., of New Franklin, by means of which appellants acquired the right of selling lottery tickets for a definite period, the State could not, by any instrumentality of its people or government, impair the obligation of that contract. It is essential to the idea of a binding contract that it should be in conformity with the will of the people as declared in its laws; that it should rest upon a good or valuable consideration; and that it should be made in good faith. If wanting in any of these elements it cannot be said to have any obligation which the law will recognize; but, having them, it is the principal function of courts of justice to give effect to the engagements which men thus form. Sometimes this is done by decreeing their specific performance; oftener by giving damages for their non-performance. The mode of doing these things is necessarily committed to the good faith of the State; and government may be almost said to be good or bad in exact

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proportion to the thoroughness or remissness with which this duty is performed. But the fundamental rule contained in the Federal Constitution, and repeated with great emphasis and amplitude in the organic law of Missouri, requires that, whatever else is done, the obligation of a contract shall not be impaired. This injunction has always been observed, and will always be observed, by the courts of Missouri. A contract may be brought before them the terms of which are harsh and unequal; but, if the parties with their eyes open have chosen to make such a contract, a court can and will do nothing to impair such obligation as it professes. It will listen to any suggestion of fraud, want of consideration, illegality, or matter of discharge; and will determine according to its best discernment whether the contract had any original validity, or whether, being originally valid, its obligation has been satisfied. But, if it be unassailable for these or similar reasons, the law must take its course, without any regard to the real or fancied condition of public sentiment, or what may be thought of public policy. The policy of a State can be known to a court of justice only by the laws of that State. These furnish the only authentic expression of the public will, and to every other evidence of it courts should be deaf and blind.

The contract of 1842 must, I apprehend, be regarded as unimpeachable. This is the view of it taken by the Supreme Court of Missouri (*State* v. *Morrow*, 26 Mo. 131), in which the validity of that contract was directly impeached. No reference was made then, or at any time, by the court of last resort, to the supposed contract of 1849, but the contract of 1842 is distinctly upheld. By this decision all courts are bound. A regret may be felt that the case in which that decision was reached did not lead the court to scrutinize the features of that contract—to note the differences between the end proposed by the Hospital lottery and the New Franklin lottery, the desirableness, at least the *possible* desirableness, in the one case, of receiving the money

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raised in minute installments distributed over an extended period, and the absolute, almost ludicrous, inconsistency of such a mode of payment with the design of building a railroad. The trustees of New Franklin, in 1842, professing to contemplate the building of such a road at a cost of $15,000, and having at their disposal only one resource for raising that sum, converted the fund derivable from this source into an annuity, for thirty years, of $500, payable semi-annually; that is, they agreed to receive just 3 1-3 per cent. per annum for thirty years of the sum, the whole of which was, by hypothesis, needed to build the road. No one in his senses could imagine that the road could be built, during the whole period, by means of this annuity; and the conduct of the trustees, who failed to appropriate a dollar of this money towards this object, was in a certain sense judicious. To apply money in such driblets to such an enterprise would be merely throwing it away. By reducing their means as they did by this contract, they so palpably disabled themselves from accomplishing their professed purpose that it is not easy to understand that this purpose was seriously contemplated by any party to that instrument. But the decision quoted, especially in the light of the act of December 6, 1855, closes all inquiry into the validity of that contract, or any other made prior to December 6, 1855, professing *on its face* to be made for "the purpose of raising the amount of money authorized to be raised by the said act of incorporation * * * for the purpose of constructing such road * * * from the bank of said river to said town." But no contract not having (at least *on its face*) such a purpose can be aided by this act.

The State now claims that the contract of 1842 has expired; that the period it covered has been completed; and that appellants can no longer invoke its aid. This would appear to be true. At the date of that contract $1,100 had been raised and paid to the trustees, etc., of New Franklin, and only $13,900 remained to be raised and

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paid to them. The payment of this sum was provided for by the engagement of Gregory to pay $500 annually, beginning in 1843. The answer sets up that ample security was given for the performance of this engagement. The last payment would be $150, payable June 1, 1870, and thereafter, according to the terms of that contract, no one could have, under the acts of 1833 and 1835, and the contract of June 1, 1842, the right to sell lottery tickets in Missouri. But appellants insist that the period during which such selling was legalized was extended by the contract of April 11, 1849.

To this the State replies that this contract appears, on its face, not to have been executed by Gregory; that it does not appear to have been executed by the trustees of New Franklin; that it is unsupported by any consideration, and so has no obligation; that it is not a contract having for its purpose the raising of money in furtherance of the objects contemplated by the act of 1833, but the hindering and obstructing of those objects; and that it does not, assuming it to be within the powers of the trustees for all the objects which are within its scope, profess to extend the duration of the privilege of selling lottery tickets, but only the time within which payment is to be made for that privilege; in short, that it grants relief to Gregory in respect of his engagement to pay the price, and virtually accepts the payment of a smaller sum than the engagement of 1842 contemplated; but that it does not profess to give him a larger privilege for this reduced price.

We cannot look into the question of the authenticity of the contract dated April 11, 1849. That point was decided by the Circuit Court in favor of appellants, and the State did not except to that decision.

The other objections appear to be better founded. By no definition we have been able to find, of what the law intends by a consideration, can we reach the conclusion that this contract of 1849 rested on that essential support.

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By its terms it is not so much confessed as proclaimed that Gregory had not paid one dollar since June 1, 1842, when $1,100 had already been paid by others and credited to him. The trustees had, as we are bound to conclude from the answers of appellants, the right to receive and the power to exact from him, for arrears of installments due before April 11, 1849, the sum of $3,250, besides interest. In like manner they would, between that period and June 1, 1851, have the right to receive and the power to exact from him, under his engagement of 1842, the further sum of $1,250, besides interest; making a total of $4,500, of which more than two-thirds, with interest, was due at the date of the contract. In place of all this, those trustees agreed to receive in hand, without interest, only $500, to suspend any further payment until July 15, 1851, taking no interest for the forbearance, and to receive, then and thereafter, the suspended installments at the old rate. It was declared that there would be payable, on and after July 15, 1851, the sum of $13,400; and this proves, in a manner which leaves no room for doubt, that all interest was remitted, and that the total of the sum received and to be received, first and last, by the trustees, from Gray and Eicholtz, Hawthorne and Gregory, was the sum of $1,100 paid before 1842, the sum of $500 paid in 1849, and $13,400 to be paid in and after July, 1851, or $15,000 in all. No allowance whatever being made of interest for the time that payment was delayed, nothing is clearer than that this was contemplated and provided for by that paper of April 11, 1849. Has such a transaction any validity? Has such a contract any obligation?

Clearly, nothing was given or done by Gregory in return for the enormous concession he obtained from the trustees. There was no possibility of benefit to the latter; all that appears, or that can appear, was net loss to them. It is, indeed, declared that the agreement was made in consideration of $500 paid by Gregory. But it is manifest that at

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this time Gregory was bound to pay them more than six times this sum, with interest. The payment of this small percentage of a debt overdue and secured can be no consideration for a new promise. On the face of the paper it is plain that the trustees neither got, nor expected to get, any thing in return for the indulgence they extended to Gregory.

But this contract purports to be under seal; and it is said that a seal imports a consideration. It can hardly be contended that this presumption goes so far as to substitute a different and sufficient consideration for that ascertained by the instrument itself. The rule of law giving a different effect to a contract to which a scroll is appended, by way of seal, from that which it would have had but for this very formal and technical addition is not one to which any respect would be given at this day but for the remote age in which it originated. The reason of the rule has long ceased, but courts of justice will leave its abrogation to the legislative power. There is, however, a rule, quite as well settled as that which has just been quoted, which declares that where the consideration is expressed in a written instrument no other can be proved, unless there are words which indicate other considerations, or where the consideration proved is of the same kind, but different in degree, as the amount of a money consideration. But no rule of law of which I am aware will raise a presumption, either in a sealed or unsealed contract, of a consideration different from that declared; and if that which is set forth and dignified with the name of a valuable consideration be described, and appear by the description to be something wholly frivolous, I am unacquainted with any principle by force of which we can infer, without evidence, that there was another and sufficient consideration. The party to such a contract may possibly be allowed *to prove* an additional consideration; but it is not to be gratuitously inferred merely because a scroll, by way of seal, is affixed to the paper with the signature of the contractor. It may also be doubted whether a

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person executing a contract in a representative capacity can, by using a seal, shut the door to an inquiry into the sufficiency of the reasons for which he undertakes to conclude his principal. In the case under examination we are informed, with a fullness which leaves nothing to be desired, that, for no possible advantage to the town of New Franklin, but for the mere accommodation of Gregory, the trustees of that town saw fit to relieve him of part of the obligation of his contract of 1842. No room is left for presumption. The paper tells the whole story. It is difficult to see on what grounds such an attempt on the part of trustees could find favor or toleration in a court of law. To give it effect would be to sanction what is at best a perfectly gratuitous betrayal of their trust; and I do not think that the act of December 6, 1855, gives this attempt the least support. Whatever else may be said of the contract of 1849, its purpose was not to raise money for building the contemplated road. Its aim, proclaimed on its face, was to delay and hinder the raising of that money, to impair, and partially to discharge, a contract previously made which had been considered to have in view the raising of such money.

This is not all. If the immense concession be made that the contract of 1849 was protected by the act of December 6, 1855, the meaning of that contract is still to be ascertained. There can be no doubt that its scope was to extend the time within which Gregory was to pay for the privileges he acquired by the contract of 1842, and it seriously diminished the price he was to pay for them. The argument of the appellants is that it did not stop here; that, besides diminishing the price to be paid, it increased the acquisition for which it was payable, and annexed a reward to Gregory's failure to perform his contract; that it enabled him, by delaying or refusing performance, to prolong the enjoyment of the privileges for which performance was to be the equivalent. For conclusions so anomalous we are surely entitled to demand the support of the most unequivo-

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cal declarations of intention. If the doing of this monstrous thing were clearly within their power, it would still be proper to demand that the utmost precision and clearness of language should be used by the trustees to set forth an intention to accomplish what so nearly resembles a wanton breach of trust. We examine the language employed, and have no difficulty in acquitting the trustees of the intention imputed. It nowhere appears. All that the contract of 1849 really effects is, at most, a diminution of the price to be paid by Gregory for the lottery franchise purchased in 1842. The price then stipulated was secured, and must be taken to be within the possession of the trustees, according to the terms of that security. Whether Gregory or his sureties could have pleaded the contract of 1849 in bar or in abatement of a suit to enforce that security according to its tenor, is another matter; but there is no suggestion that there was a suspension of the enjoyment of the franchise during the time that payment for it was withheld, and there is no shadow of reason for extending the term of this enjoyment in consideration of the failure of Gregory to pay for it. I am, therefore, of the opinion that for more than five years the appellants have been without the protection of a contract to justify them in selling lottery tickets in Missouri.

I think it unnecessary to express an opinion upon the effect on the assignees of Gregory of the misuser, by the trustees of the town of New Franklin, of the fund raised under the contract of sale; but, for the reasons here stated, I think the judgment of the Circuit Court should be affirmed.

LEWIS, J., delivered a separate opinion.

I concur in the affirmance of the judgment rendered by the Circuit Court, but for reasons slightly variant from those given by the learned presiding judge. I am unwilling to say that, for the purposes of this proceeding, the alleged contract of April 11, 1849, may be treated as a nullity. It

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may be true that no better terms were thereby secured to the trustees of New Franklin, and that, in fact, the extensions of time for payments were less favorable to their interests than the stipulations, if fulfilled, of the original contract. But the same may be said of every release or extension by an obligee, which is none the less effectual on that account, as between the parties themselves. Nor can the State, in any case, impeach the validity of that transaction, if by her assent she has waived whatever rights it assailed. The act of December 6, 1855, declared the State's assent to "all contracts made by said trustees for the purpose of raising the amount of money authorized to be raised by the said act of incorporation, etc., for the purpose of constructing a rail or macadamized road," etc. Such contracts were declared to be "legal," and might be "carried out according to the true intent and meaning of the parties thereto." If it can be shown that this act covered the transaction of April 11, 1849, no question remains, in my view, of the validity of the latter for all the purposes of this case. Against it are pitted, in the nature of the proceeding, some supposed rights of the State. But if all such rights have been waived by the State there is an end of their power to defeat it.

It is argued that the act of 1855 could not include the transaction of April, 1849, because it is limited to "all contracts," and that transaction was not a legal contract. But, if not that, what contract did the act embrace? All the prior contracts had then been declared by the ultimate judicial authority to be valid and unimpeachable. Did the Legislature undertake to validate what was already valid? It must be presumed that the act was passed to accomplish some object; and, as it was mere waste paper so far as the other contracts were concerned, it could have no possible application, unless to that of 1849. The very fact that the validity of this was doubted upon real or supposed grounds—especially with reference to the prohibitory acts

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of 1842 and 1845—furnishes proof of its being in the legislative contemplation, which is wholly wanting in the case of contracts to which no validating aid was necessary. The use of the word "contract" does not always imply a valid or legal contract. Law writers and courts habitually tell us of contracts that are void. If the term, in whatever connection, must always be held to mean only a legal contract, then the writers and the courts must be interpreted to mean very different things from what they manifestly do mean. The same might be said of the word "deed" in its various applications. I think the word "contract" was intended by the Legislature to cover every transaction having a semblance of such, and coming within the further descriptive limitations expressed.

It is further objected that this transaction was not one "for the purpose of raising the amount of money authorized," etc., in the language of the act of 1855, but was for the purpose of releasing some dues and extending the time of others. Undoubtedly it did relieve Gregory of obligations incurred under the contract of 1842. If it had stopped there, no more money would have been raised. But it proceeded to stipulate for future payments, in a new series of its own creation. It was, so far, whether better or worse than the former, a contract for the purpose of raising money, etc. It was, at all events, a mere modification, as to time, of the contract of 1842, and was, similarly to that, within the general scope of the original grant of power. I cannot doubt that it was in the direct line of the legislative view when the act of 1855 was adopted.

Upon the question of jurisdiction in the Circuit Court, I have no doubt whatever. The proceeding by information in the nature of *quo warranto* was a legitimate offshoot from the ancient criminal information, which is coeval with the common law itself. It was in use against usurpations of the prerogatives of the crown far more than long enough ago to make it a part of the common law as imported into

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Missouri. No private relator was ever admitted until the statute of 9 Anne. That statute, from which ours is literally copied in the particulars affecting this inquiry, has always been held to have merely enlarged the operation of the ancient proceeding. As a prerogative remedy, to be used in the common law courts without a private relator, the information in the nature, etc., remained as before. So, in Missouri, the statute does not abridge the State's right to appear by her proper officer in a court of record of common law jurisdiction, and by this remedy to resume a forfeited franchise.

A municipal charter is understood to be a delegation of the State's sovereignty, to be exercised for certain local purposes over a defined district. Such a grant is not judicially forfeitable, like a private corporate franchise. But to these grants are sometimes added franchises which constitute no feature in the local government, and may be operative beyond its territorial limits, although for the special benefit of the inhabitants of the municipal district. Such was the authority given the city corporation of New York to construct the Croton aqueduct, through which water is conveyed into the city over many miles beyond the corporate limits. In *Bailey* v. *The Mayor, etc., of the City of New York*, 3 Hill, 539, the court, in classifying such grants, said: "The distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the Legislature in conferring them. * * * Suppose the Legislature, instead of the franchise in question, had conferred upon the defendants banking powers, or a charter for a railroad leading into the city, in the usual manner in which such powers are conferred upon private companies, could it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? * * * These powers, in the eye of the

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law, would be entirely distinct and separate from those appertaining to the defendants as a municipal body. So far as related to the charter thus conferred, they would be regarded as a private company, and be subject to the responsibilities attaching to that class of institutions." Numerous authorities, English and American, illustrate the same distinction.

The charter of New Franklin was municipal, so far as it provided for regulating the affairs of the inhabitants within the territorial limits defined in the act. But, when it authorized the building of a railroad from the town to the river, the drawing of a lottery for that purpose, and the contracting for such drawing in any part of the United States, it granted a private corporate franchise, which, like any other of that class, was liable to judicial forfeiture for non-user, misuser, or breach of the conditions of the grant. It has long been settled that one of several franchises in a charter may be forfeited without its affecting the others.

The testimony in the present case discloses grounds of forfeiture as positive, and almost as numerous, as ever before tainted the annals of our jurisprudence. The sole object of the franchise has been trampled under foot by those who were charged to promote it. The money raised for that object has been squandered upon others wholly foreign and unauthorized.

But can the defendants here, as Gregory's assigns, be subjected to the consequences of a forfeiture incurred by the trustees of New Franklin? The 3d section of the act of February 26, 1835, authorizes the commissioners of the hospital lottery "to contract with any person to have *said lottery* drawn in any part of the United States," etc. The 6th section permits the trustees of New Franklin to exercise the same powers "in relation to the authority *they now have* to raise by lottery a sum of money," etc. Can it be pretended that these provisions enabled the trustees to invest another with more than had been bestowed upon

them? Whatever contract might be made, the law would enter into and become part of it. By that law the lottery franchise was conditional, and could not exist a moment after forfeiture for breach of the condition. The State could never have intended to surrender her ultimate right by authorizing a transfer of the intermediate.

Gregory must be regarded either as an assignee under legislative authority of the franchise itself, or as an agent of the trustees who retained it. In either event the controlling principles are the same. An agent cannot lawfully do more than his principal might, nor can an assignee hold more than his assignor was able to convey. The State's surrender of her right of forfeiture for condition broken must appear in express terms, without which it can never be presumed. No such surrender can be discovered in the legislation which authorized the making of the contract.

Gregory, with all the law before him, knew that he could acquire nothing in the premises except by virtue of the legislative authority. His acceptance of anything was a virtual agreement to abide by the conditions upon which that authority was given. An exercise of the State's reserved right of forfeiture for breach of condition, therefore, so far from impairing the obligation of his contract, would be simply enforcing its terms.

But it is here objected that Gregory could not compel the trustees to apply his payments to the object of the franchise, and should not be held responsible for their misappropriation. I cannot admit either proposition. When he purchased he knew that the trustees, independently of what good faith to him required, were bound by law to apply the purchase money to a certain purpose. Is it possible that they could, by any act or omission, willfully violate a public duty, threatening destruction of the right they had granted to him, and yet leave him remediless? Whether this be so or not, he had it in his power to stipulate for such an application of the money as would protect

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his acquisition. The State cannot be deprived of her ultimate right of forfeiture by his reckless faith in the fair dealing of the trustees.

I attach no importance to the authorization of the trustees to contract "on such terms as they shall consider most advantageous." No terms could be implied which would be in derogation of existing law.

The defendants, as Gregory's assigns, stand in no better position than he did. I am, therefore, of opinion that the judgment of ouster ought to be affirmed.

BAKEWELL, J., dissenting.

This is an information in the nature of a *quo warranto*, filed by the Attorney General in virtue of his office, by which the appellants (respondents below) are called upon to show by what warrant of law they exercise the franchise or privilege of drawing a lottery in the State of Missouri. The information recites several acts of the Legislature, and contracts, or alleged contracts, by which the alleged franchise is claimed by appellants to have been granted, conveyed, and extended; and sets forth that appellants maintain fifty-two offices in St. Louis where lottery tickets are sold and drawings made, by which means appellants receive large profits, said to be $1,000 a day.

The information further sets forth that the said lottery franchise was granted for the purpose of building a plank road from the town of New Franklin to the Missouri river, for the relief of the town; that the moneys arising from the lottery franchise have not been appropriated for the charitable purpose for which they were designed; that no such road exists; and that, since 1862, the trustees of the town have misappropriated the funds derived from said lottery. It is claimed that by reason of such misuser and non-user the appellants have forfeited all pretended right to run the lottery.

It is further charged that the contract of 1849, by which it was attempted to extend the time during which the lot-

tery might be drawn, is illegal, and not validated by the act of 1855 relating thereto.

Appellants, in their answer, admit that they claim the franchise granted to the town of New Franklin as alleged, and are now exercising said lottery franchise by virtue of the act of Assembly and agreements set forth in the information, and also by virtue of other legislative enactments referred to in the answer, and also by conveyance from the grantees of the contracts mentioned in the information. They say that they purchased the right to run the lottery since the passage of the act of December 6, 1855, and under the belief that the modification made in 1849 of the contract of June 1, 1842, was by said act made valid and binding; and they plead the act as part of their title. They say that they have complied with the contract of 1842, as modified by that of 1849, but have no knowledge as to how the trustees of New Franklin have applied the funds received from appellants under that contract. They deny that the profits of the lottery are as great as charged.

Judgment of ouster was rendered by the Circuit Court, and from that judgment appeal is taken to this court.

It appears from the evidence and admissions of record in this case that, in 1833 (2 Terr. Laws, 327), the General Assembly granted the charter for a lottery for the benefit of the hospital of the Sisters of Charity of St. Louis, to raise thereby $10,000, through commissioners named for that purpose; and at the same session the Legislature incorporated the town of New Franklin, and in the act of incorporation created a board of trustees to have charge of the municipal affairs of the town. These trustees were, by this act, authorized to raise $15,000, by lottery, to build a railroad from the Missouri river to the town. This was an act of charity—the old town having been washed away by floods, and the inhabitants being compelled to retire to the bluffs about a mile and a half off. In 1835 an amendatory act was passed, authorizing severally the commissioners of the

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hospital lottery, and the trustees of the town of New Franklin, to contract with any person or persons to have said lotteries drawn in any part of the United States, and on such terms as they shall consider most advantageous. In 1839 another amendatory act was passed relating to the New Franklin grant alone, by which the governor was authorized to make inquiry as to how much money had been received, and how much it would take to complete the road, and to issue his proclamation authorizing the trustees of New Franklin to raise such sum, not to exceed $15,000, by lottery; the road was also hereby changed to a macadamized road instead of a railroad. On November 17, 1840, Governor Boggs issued his proclamation according to law, and a contract was made with Gray and Eicholtz, who, after paying over some money under their contract, shortly abandoned it, and, on June 1, 1842, the trustees of New Franklin made a contract with Walter Gregory, by which they sold him the lottery and all right to control the same; $1,000 heretofore paid by Gray and Eicholtz, and $100 from Hawthorne, were to be considered as payments, and the balance of the original $15,000 to be paid in semi-annual installments of $250 each, beginning January 1, 1843. (The full payment of $15,000 would, therefore, be completed on July 1, 1870.) Gregory is to assume all risks and pay all prizes. If installments are not paid, the contract may be forfeited on forty days' notice. The parties are not to be bound by the agreement in case of legislative, judicial, or other interference, so that Gregory cannot conduct the lottery; and he has the right to assign or abandon the contract on ninety days' notice to the trustees. This contract and sale was passed upon by the Supreme Court, in 1845, at the October term, and again, in 1848 (*State* v. *Hawthorne*, 9 Mo. 390; *State* v. *Morrow*, 12 Mo. 279), in passing upon the contract for the hospital lottery, declared to be essentially the same (*State* v. *Miller*, 50 Mo. 132), and it was decided that the commissioners were authorized to sell the

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lottery, that the sale to Gregory was valid, and that any act of the Legislature prohibiting the sale of lottery tickets in this State would be void as to the vendee, Gregory, and his legal representatives, and in no way impair his or their rights acquired by said sale.

In April, 1849, the trustees of New Franklin and Walter Gregory agreed upon a modification of the contract of 1842 as to the times of payment. But for this modification, in view of the legislation on that subject in this State, there can be no question that all lotteries have been illegal since 1870. The question to be decided in this case is whether, in view of the acts of the Legislature in regard to lotteries, and the constitutional prohibition of them first adopted in 1865, the alleged contract of 1849 can be upheld. If it is valid, the Missouri lottery cannot be abolished in this State, without the consent of its proprietors, until 1877; if this contract is void, its drawings have been illegal since 1870.

I have considered the questions of law and fact involved in this case with all the care of which I am capable, fully assenting to the *dictum* of Judge Wagner, in *State* v. *Miller*, 50 Mo. 133, that "the continuance of a lottery is doubtless an evil, but its abolishment by throwing down the legal barriers which have been built up for the protection of the citizen and his property would be a still greater evil."

It has been urged upon the court that a supposed "public policy" requires that the laws of property and individual rights should be made to bend in this. As a judge, I energetically repudiate such an idea. Public policy is represented to me only by the laws, which I sit to interpret, and not to make. The suggestion, "to do a great right, do a little wrong," is an evil one, and as contrary to good law as to sound morals.

The new contract of April, 1849, between the trustees of New Franklin and Walter Gregory, is sealed with the seals of the trustees, and recorded on the records kept by the trustees, in the form of an ordinance. The court below

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admitted a certified copy, or what purported to be a certified copy, of this contract, against the objections of the State. I see no force in the objections urged to its admission, but it is not necessary to set them out, as it was admitted, and the prevailing party cannot in this court object to the ruling of the court admitting evidence. The agreement is as follows: "This agreement, made and entered into this 11th day of April, 1849, by and between the board of trustees of the town of New Franklin, at a called meeting of said board on the date hereof, and Walter Gregory, witnesseth that the said board have resolved that for and in consideration of the sum of $500, paid by said Walter Gregory on the day of the date hereof, in addition to the sum of $1,000 paid on the contract dated on 1st of June, 1842, the said Gregory is hereby released and discharged from all further payments under and by virtue of said contract until July 15, 1851, but from said 15th July, 1851, the semi-annual installments of $250 to commence and continue, according to the terms and tenor of said contract, until the further sum of $13,400 is fully paid, making the full sum of $15,000, as contemplated in the act of the Legislature of Missouri, to which said contract is referred, is raised."

It is said that this contract of 1849 is void as being a nude pact, and that, not being a contract, for want of consideration, it is not within the language of the act of 1855, and is not ratified thereby. In any other case but this it might be considered hair-splitting to argue that an instrument purporting to be a contract, but not really so for want of consideration, does not come within the scope of a validating act referring generally to "all contracts." I hold that there is nothing whatever in the argument, for three reasons:

1. That, even if this were not, strictly speaking, a contract, because not a legal or valid one, still it would be ratified by the act of December, 1855, since it would be absurd to suppose that that act was passed to validate con-

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tracts believed by the Legislature to be valid contracts without it.

2. That consideration is not of the essence of a contract, though it is necessary to support one; and,

3. That a contract under seal, as this is, needs no consideration whatever, and is perfectly binding between the parties, not only without a consideration named, but even when the consideration, as in this case, is set out and appears to be no consideration at all, because a consideration already past.

As this contract of 1849 is the key-stone to the arch, and the right to run the lottery at this time depends wholly upon the question whether it can stand or not, I pause to support the propositions just laid down.

A contract or agreement is *where a promise is made on one side and assented to on the other.* This is a strictly accurate definition. It includes nothing which can be left out, and excludes nothing which is essential to the thing defined. Blackstone defines a contract "an agreement, upon sufficient consideration, to do or not to do a particular thing;" and this, perhaps, might serve as an example, in a text-book on logic, of a bad definition, independently of the objection that the word *agreement* requires to be defined as much as *contract* does. The existence of a consideration, though no doubt necessary to *support* a contract—that is, to give it validity, so that it can be enforced by the courts—forms, properly, no part of the idea—of the essence—of the thing, and should be rejected from its definition. We constantly consider and speak of the contract itself as something distinct from the consideration. Blackstone's definition has a third fault: It excludes an essential element of a contract—that which properly distinguishes a contract from a promise—its mutuality.

The contract of 1849 is a *deed*, not a *simple contract.* The legal efficacy of a deed will not be prevented by the mere want of consideration. For in this respect deeds

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are distinguished from simple contracts, to the validity of which some consideration is essential; but a writing sealed and delivered is supposed by the law to be made with due deliberation, and to express fully and absolutely the intention of the party by whom it is executed. He is, therefore, bound by its execution, whether he received a consideration for the grant or consideration which it comprises, or not. This is perfectly well-settled law. Bac. Read. Uses, 79; *Bunn* v. *Gray*, 4 East, 200; *Irons* v. *Smallpiece*, 1 Barn. & Ald. 554; *Pratt* v. *Barker*, 4 Russ. 507. It will not do to say the reason of this law has ceased. In the first place, I do not concede that, for I think it well to have some solemn form of contract which, except in case of fraud, shall absolutely bind, and from which parties shall not be allowed even to attempt to resile; and, in the second place, on the faith of this well-settled law, parties do now, every day, contract. It is on the *certainty* of the law that our peaceful holding of our possessions rests.

When it is said, then, that this contract is void, being a naked pact, it is sufficient answer to say that this is a specialty, a deed, a contract under seal, and not a simple contract, and, therefore, needs no consideratien for its support. Smith Con. 81. Persons may, if they will, contract a gratuitous obligation by deed. Id. 86. Had it been a simple contract, however, and not valid for want of consideration, it would have come strictly within the definition of a contract, though one which the law would not enforce. There is the meeting of two minds—the request on one side and assent on the other—which are the essence of a contract. *Jackson* v. *Galloway*, 5 Bing. N. C. 75; 2 Steph. Com. 109, note; Smith Con. 89, note. It is, therefore, within the language of the act of December 6, 1855, which provides that "all contracts made by the trustees of the town of New Franklin, for the purpose of raising the amount of money authorized to be raised by the said act of incorporation and the said act amendatory thereof, be, and

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the same are hereby, declared to be legal, and may be carried out according to the true intent and meaning of the parties thereto."

It is said that the contract of 1849 was void because there existed, at the time of its execution, a general law of the State prohibiting lotteries. Such a law was enacted in 1836, and was in force also when the contract of 1842 was made, but this lottery was exempted from its operation. The same power which passed the general lottery act of December 19, 1842, by ratifying the contract of 1849 repealed its provisions so far as the Missouri lottery was concerned. It certainly had the power to do so. The same legislative power which prohibited lotteries in 1842 and 1845 could repeal these laws and permit sales of tickets in 1855.

It is, however, urged that, in view of acts passed against lotteries in 1842 and 1845, the trustees of New Franklin had no power in 1849 to make any contracts extending the time of drawing the New Franklin lottery. To this the answer is made that the act of 1855 ratifies and makes good this action of the trustees, and that the subsequent ratification is equivalent to a previous grant; and it is replied on the part of the State that such attempted ratification is in violation of the constitutional provision then in force in this State, that "no law retrospective in its operation shall be passed." The Legislature undoubtedly could not pass a law changing a contract between individuals, making good a void deed, or making that a man's will which, being informally executed, was not his will in the eyes of the law at the time of the death of the testator; but the Legislature unquestionably could, and can, validate, with the consent of the other party to the contract, the irregular acts of the authorities of one of the counties or municipal corporations of the State. The State, in the matter of the modification of the contract of 1842, even if its modification by the contract of April 11, 1849, was in excess of the powers of the trustees of New Franklin, might well say: This is my

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contract, made through my agencies, and I ratify it. This has been decided in this State. Such laws have been passed again and again, and the Supreme Court has decided that they were not retrospective in the sense of the Constitution. *State of Missouri* v. *Barton County* The act of 1868, validating the void bonds of the county of Franklin, was held to be perfectly good, and a valid curative act.

There was no constitutional provision against lotteries in this State until 1865. If, then, the contract of 1849 was valid when made, or was in 1855 made valid by the Legislature, no subsequent constitutional ordinance, no law, no decision by any court whatever, could afterwards in the slightest degree impair its validity, and it is perfectly valid now. *State* v. *Miller*, 50 Mo. 133.

It may be said that the legislation on this subject was imprudent—that the grant to the town of New Franklin was rash and unwise; but, if it was done, the courts cannot undo it. The learned judge who tried the cause below, in his written opinion, asks: "Can it be possible that a franchise granted to raise $15,000 for a charity can be transferred into an immense private income, affording but a pittance to the charity?" He answers that it cannot be. But, unfortunately, it seems that it is; and why not, if the Legislature gives to the grantees a right to sell the franchise and they make a foolish bargain, or if the bargain turns out better for the purchaser than at the time it was believed it would? The learned counsel who appeared for the State, in *State* v. *Morrow*, 26 Mo. 140, in his brief, also asks, in regard to this transaction: "What is there to prevent the trustees from agreeing to receive one dollar a year, and legalizing the lottery for 15,000 years?" Nothing whatever, I suppose, if the Legislature empowered them to do so, and there was no constitutional provision against it. And, as Judge Scott says in that case (1857): "The General Assembly having by a late law ratified the contract made by the trustees for

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the disposition of the lottery, this cannot be a matter of much importance."

The present defendants are, as appears by the record in this case, by *mesne* conveyances, the assignees of Gregory, who died twenty years ago. It is to be presumed that they paid full value for the franchise which the Legislature and the courts authorized him to sell. But that concerns us not at all.

The rule of property seems to me to have been fully established when they bought, and they, doubtless, at the time of the purchase, confidently relied upon the laws of their country for the protection of their legal rights. This is not a matter of sentiment, but a plain question of right and wrong; and to disturb defendants because they are making a fortune out of the lottery is what no legal power on earth can do.

The learned judge below admitted evidence to show that the trustees of New Franklin misapplied the funds received by them from the lottery. He held this to have been a forfeiture of the franchise, and gave judgment of ouster. A forfeiture of what franchise? Judgment of ouster against whom? The trustees of New Franklin, under the authority of the State, sold their right to run a lottery. The law which gave them this lottery privilege gave them express power to do so. How could they forfeit a franchise which they had sold? Before they sold it, the Legislature could have taken it away, because it was a pure gratuity, but after they had, by authority of the Legislature, sold it, their assignees for value were in a very different position. It was a matter of contract, and the legislature was powerless to impair the obligation. The learned judge below says: "The franchise being a contract, the Gregory contract is ingrafted on it, and thus we have one franchise." But the original grant of the franchise was clearly no contract, and the Legislature could have abolished the town and all its

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franchises, this among them, at any time before a sale. It can, for that matter, abolish the town to-morrow. The creator can destroy, at will, its own creature, yet the lottery privilege, sold by its permission more than thirty years ago, would remain unimpaired. Is it supposed that the Legislature gave to the town of New Franklin a right to sell a lottery privilege revocable at the legislative will? Who would buy such a right? What would it be worth?

It is a mistake to say that these franchises of the right to run the town and the right to run the lottery are an entirety. They can be separated. Where several franchises are granted by one charter, forfeiture of one does not forfeit the others (Tancrede, Quo. War. 257), and a court would refuse to forfeit the municipal franchise of the town of New Franklin for violation of its provision by the trustees. These franchises are for the benefit of the people, not of the trustees. High on Rem., sec. 680. But any inhabitant of the town could, at any time, have compelled these trustees to appropriate the receipts of the lottery in accordance with the law. Over this matter, however, Gregory and his assignees had no control; and, in my judgment, it was error to admit, in a proceeding of this character against the assignees of Gregory, any evidence either as to the receipts of the lottery or the misappropriation of the fund paid to the town of New Franklin. This was done against the objections of appellant, and the points were duly saved. I cannot, therefore, concur with the majority of the court in sustaining the judgment of ouster.

I concur, however, in thinking that the Circuit Court has jurisdiction of an *ex-officio* information in the nature of a *quo warranto*. I do not think the statute on the subject has the effect of limiting the common-law jurisdiction of the Circuit Court in this respect.

Because the statute makes it imperative on the attorney general or circuit attorney, under certain circumstances, to exhibit in the Circuit Court an information *ex relatione*, I

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do not see that it at all follows that he cannot do so *ex officio*, and I do not believe that the law was meant to limit the jurisdiction of the Circuit Court in the matter. The question has never been directly presented for decision in the Supreme Court; but, in *State*, ex rel. v. *Cape Girardeau Railroad Company*, 48 Mo. 468, the circuit attorney *ex officio* appears to be the relator, and the jurisdiction of the Circuit Court is not questioned at all. The writ of *quo warranto* had fallen into disuse so long before the time of Coke that he could not determine when the justices in eyre ceased, and with them the writ that was used only during the continuance of that institution; but, long before James I., informations in the nature of *quo warranto* were in use, and the practice was adopted into this State with the common law of England. The writ, after the circuits of the justices in eyre ceased (which was at some uncertain period after Richard II., and before the Tudors), became returnable before the King's Bench and the other courts at Westminster. The statute of Anne (9 Anne, ch. 20) was passed to give the remedy full effect in England, and provides that it shall be lawful for the proper officer, with leave, to exhibit an information *quo warranto* at the relation of any person desiring it, who shall be named therein and be responsible for costs, etc. I do not think that our statute was any more intended to oust the jurisdiction of the Circuit Court than was the statute of Anne to oust that of the King's Bench; neither statute confers upon the court its jurisdiction, nor is either statute intended to define or limit it. As the King's Bench has jurisdiction of an information in the nature of a *quo warranto*, without other relator than the attorney general, so has our Circuit Court.

But, for the reasons stated above, its judgment in this case should, in my opinion, be reversed and judgment entered for the appellant in this court.

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THE STATE OF MISSOURI, Respondent, v. HENRY DIECKHOFF, Appellant.

January 31, 1876.

Where there was no evidence whatever to warrant a conviction below, the defendant will be discharged in this court.

APPEAL from the St. Louis Court of Criminal Correction.

Reversed and defendant discharged.

J. G. Lodge, for appellant, cited: Wag. Stat. 1330, sec. 5; State v. Marshall, 47 Mo. 378; State v. Bird, 1 Mo. 585; State v. Packwood, 26 Mo. 340; State v. Dave, 15 Mo. 263; State v. Cruise, 16 Mo. 391; State v. Mansfield, 41 Mo. 470; State v. Connell, 49 Mo. 282.

M. W. Hogan, for respondent.

BAKEWELL, J., delivered the opinion of the court.

An information was filed in the St. Louis Court of Criminal Correction charging that defendant, on February 15, 1875, unlawfully had in his possession, and kept for sale, one dozen bottles of a compound called "Boker's Bitters," upon which was placed a forged label or trade-mark, intended to represent said compound as the genuine preparation of another person, viz., Louis Funk, jr. Samples of the alleged counterfeit and genuine labels were attached to the information. The information further charged defendant with unlawfully selling bottles of a compound called "Boker's Bitters," on which counterfeit labels and trade-marks were placed, intended to represent said bitters as the genuine compound of another person, viz., Louis Funk, jr., and reference is made again to the same samples attached. A jury being waived, the defendant was tried before the court.

An attempt was made to show by William Schrœder, a lithographer, that he printed certain labels for defendant, and that defendant gave him an order for certain labels; but Schrœder swore that he knew nothing in regard to the

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matter at all, except that defendant had a running account with witness for printing labels, and that a label of the general appearance of one offered in evidence has been in the market for twenty-two years. James Coff, a deputy marshal, swore that, on the day he arrested the defendant under the information herein, defendant said he had bitters on hand; did not say he had "Boker's Bitters;" and witness captured in defendant's possession a bottle of bitters with a label attached, which label bears the inscription of "Dieckhoff's Stomach Bitters" and on which the name "Boker" nowhere appears. This label, together with the genuine "Boker's Bitters" label, and also the alleged counterfeit label, are attached to the record in the case. The alleged counterfeit attached to the information is almost a *fac simile* of the original "Boker's Bitters" label; but the label captured on the single bottle in possession of defendant, though of the same color and shape and general appearence, has a different name, and could only be mistaken for the Boker label at a distance too far off to read ordinary print.

David Nicholson testified as to his opinion of the similarity of the Dieckhoff and Boker label; also, that Boker's bitters are worth $12 a case, that they are made in New York, and the labels for the bitters also made in New York.

Charles R. Holmes testified that defendant told him last fall that he was making a "Boker's Bitters," and could sell it at $8 or $9; and that witness warned him he would be prosecuted if he did not stop, and that defendant then said if that were so he would label his product differently. Witness also said that Dieckhoff's bottle looked like the Boker bottle, but that the Boker bottle was not exclusively used for "Boker's Bitters;" and this was the whole evidence in the case.

The court gave the following instructions, at the instance of defendant:

The court instructs that, in order to convict defendant

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on the first count, the court must be satisfied from the evidence—

1. That there is a genuine article of Boker's bitters manufactured, or the property of one Louis Funk, jr.

2. That said Funk has a special property in the labels designated as genuine in the complaint.

3. That defendant used, or kept for sale, the imitation or counterfeit of the genuine Boker's bitters annexed to complaint and designated as counterfeit.

4. That said counterfeit bitters had labels attached to them which were intended to deceive the community that the goods to which they were attached were genuine Boker's bitters.

5. That defendant did such act knowingly.

6. That, unless plaintiff has satisfied the court by proof that one Louis Funk, jr., manufactured certain goods which were well known by the name of Boker's bitters, and which were put up in bottles which were marked with the label designated as genuine in the complaint, plaintiff is not entitled to judgment.

The court then found defendant guilty as charged in the first count of the information, and fined him $500 and costs.

A motion in arrest, and for a new trial, were both overruled, and, the proper exceptions being saved, the case was brought here by appeal.

There was no evidence whatever to warrant conviction on either count of the information. Not only is this so, but the court first gives a declaration of law that, to convict the defendant on the first count, the court must be satisfied from the evidence of the existence of at least six separate and independent facts, as to at least four of which it is clear that there is no evidence at all, and then deliberately finds the defendant guilty on the first count. Comment would be wasted.

The judgment of the St. Louis Court of Criminal Correction is reversed, and the defendant absolutely discharged. The other judges concur.

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THE STATE OF MISSOURI, Respondent, *v.* PETER BROWN, Appellant.

January 31, 1876.

1. A party charged with murder made a confession, which was reduced to writing in his presence, his precise words, however, not being used. He then signed the writing; it was witnessed, and, being proved, was read against him at the trial. He then offered evidence tending to show that his words had been misunderstood, and that he had not said what was stated in the writing. The criminal court excluded this evidence. *Held*, erroneous.

2. Where the body of the deceased had not been seen since the alleged murder, but there was pregnant evidence of the *corpus delicti*, independent of the confession of defendant, *held*, sufficient to authorize the admission of the confession.

APPEAL from St. Louis Criminal Court.

Reversed and remanded.

Aug. W. Alexander, for appellant, cited: Wills on Cir. Ev. 84; 2 Hale's P. C. 290; 1 Stark. on Ev. 511; 1 Greenl. on Ev. 17, sec. 13; 1 Park. (N. Y.) Cr. 609; Ruloff *v.* People, 18 N. Y. 179; Tyner *v.* State, 5 Humph. 383; Mose *v.* State, 36 Ala. 231; Jenkins *v.* State, 41 Miss. 583; Pitts *v.* State, 43 Miss. 480; 15 Wend. 155; 17 Ill. 428; 4 Minn. 375; 32 Miss. 433; 33 Miss. 352.

J. C. Normile, Circuit Attorney, for respondent, cited: People *v.* Bagley, 16 Wend. 53; Bergen *v.* People, 17 Ill. 429; 1 Bishop's Cr. Pr., secs. 499, 501, inclusive, and note 2 to last section; State *v.* Cowan, 7 Ired. (N. C.) 344, 345; Burrill on Cir. Ev. 497, 498; State *v.* Lamb, 28 Mo. 230–232; Birdsong *v.* State, 1 Green Cr. Rep. 733.

GANTT, P. J., delivered the opinion of the court.

Peter Brown was convicted of the murder of Celia Brown on April 16, 1875, in St. Louis county, at a place called Hog Hollow, in Bonhomme township. The evidence against him consisted of numerous circumstances strongly tending to the conclusion of his guilt, and of his own full and free confession. His counsel have strenuously urged that there is no proof of the actual commission of a murder

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(the *corpus delicti* in this case); that the body has not been found, and that the confession of the prisoner, unaided, is not enough to establish both the *corpus delicti* and his own share in the commission. With this view they demurred to the evidence on the part of the State. The Criminal Court overruled the demurrer, and referred the evidence to the jury, with instructions to which no exceptions are well taken. The prisoner then gave some testimony on his part, and the jury declared him guilty of murder in the first degree. It is not perceived how they could have done otherwise; but the judgment of the Criminal Court must be reversed for an error which, though it may not have contributed to the conviction of the prisoner, may yet possibly have done so; and, in capital cases, even the possibility of prejudice, through error of the court which tried the accused, is fatal to the judgment pronounced on a verdict of guilty.

The error referred to consists in the exclusion of legal and proper evidence offered by the prisoner. It appears that the deceased was his wife; that she and the prisoner resided at the place of the murder, in a small house of two rooms, on the ground floor; that she wished to come to town; that he was opposed to her so doing, and that quarrels had ensued between them on this subject, during which, and following which, he had used very threatening language to her. He declared to some of his neighbors, a very short time before the disappearance of his wife, that he would kill her if she persisted in her purpose of going to town. The last time she was seen alive by any of the witnesses (who, as well as the prisoner, were, with the exception of the policeman and a witness to character, persons of color) was on the evening of April 15, 1875. She was then engaged in ironing some of her dresses. Next morning, about nine A. M., the house was discovered to be on fire, and some of the witnesses ran thither to extinguish it. They found a puddle of blood on the floor, near the hearth, on which ashes had been strewn. In the back room, in a

corner, lay what the witnesses call "a bundle," looking like a bed rolled up. The fire was in the front room. They extinguished it; but, though they did not see the deceased at all, no one seems to have gone into the back room. The dresses she had ironed the day before were hanging up in the front room. The fire was in the bed, in the front room, and the clothes were bloody. The prisoner arrived while the persons who had come to extinguish the fire were still at work, and threw on the fire the clothes which had been taken from the bed. On being remonstrated with, he rescued them from the fire. He told some relatives of the deceased that she had gone to town. That night he asked his brother, who lived near, to help him to remove the body of his wife from his house and throw it into the river, which was less than a quarter of a mile away. He said he had killed his wife, and wished to conceal her body. The brother refused to help him. That night, at a late hour, he went over to his brother's house and spent the remainder of the night, and about the time he reached his brother's house his own was on fire. It was entirely consumed. Prisoner then went to Junction City, Kansas, and was arrested and brought to this city on or about May 10, 1875. Being in the office of the chief of police on that day, he made a confession in presence of Stiles, Fox, and Harrigan. Stiles wrote down what he said, and the witness signed it. Stiles admits, however, that he changed "the language and grammar" of the prisoner in reducing his confession to writing. Fox and Stiles signed the paper as subscribing witnesses. It was carefully read over to the prisoner before he signed it. It was not procured by threats or promises, and appears to have been freely made. It is in the following words: "I, Peter Brown, of my own free will and accord, in the presence of L. Harrigan, chief of police, Capt. W. Fox, and A. J. Stiles, make the following free and full confession of the killing of my wife, Cynthia Brown: I think it was on Thursday, 15th or 16th of April,

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about eight o'clock A. M., that we had a quarrel in regard to her leaving me and coming to town to live; and she cursed me and called me a God damned son of a bitch, and I picked up a club of wood and struck her over the head with it twice, knocking her down and killing her. She expired in a few minutes after I struck her. After killing her, I wrapped her up in a bed-quilt and carried her into the other room, and laid her in the corner. I then took a chunk of fire out of the fire-place and put it in the bed; after which I thought it would be too cruel, and thought I would put the fire all out, and left the house thinking I had; but I expect some of it was still in the straw, for after I went away it broke out again, and was put out by John and Joe Morris; but I don't think they saw the body in the other room, for they said nothing to me about it when I saw them afterwards. At night I returned and carried the body to the river, where I fastened a sack containing a large rock to the body, and threw it into the river. After throwing the body into the river I came back and set the house on fire, and then went away to my brother William's and staid all night, and in a few days went to Junction City, Kansas, where I was arrested. No one had anything to do with the killing but myself. After the killing I told my brother, William Brown, and asked him to help me carry her to the river, but he refused to have anything to do with it. I know right where I throwed [*sic*] the body, and will tell the officers, so that they can go and find it. It is just below a large sycamore tree where I throwed [*sic*] her in, about four hundred yards from the house, in a straight line."

This confession was proved to have been made and signed by the prisoner; and Capt. Fox, who was examined by the State, was able, independent of the writing, to repeat all the material statements of it, as he heard it at the time. On cross-examination he was asked: "Did not Brown say that he struck her with a *stick* instead of a club of wood, and at the same time described its size by comparing it with

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his thumb or finger?" The counsel for the State objected to the question, "*because the statement of the accused is in writing, signed by himself, and cannot be contradicted by him.*" The objection was sustained, and the prisoner excepted.

Stiles was sworn as a witness for the prisoner, and, after stating that the prisoner signed the confession as taken down by him, after hearing it read, the counsel for prisoner offered to prove by him (Stiles) that, at the time this confession was alleged to have been made, "the prisoner said that he was greatly excited when his wife called him a God damned son of a bitch, and that he struck her with a stick without any intention of killing her—with a small stick, about the size of his thumb; and, generally, the counsel for the accused offered to prove the inaccuracy of the statement or confession signed by Brown, and to contradict it." The court ruled that such evidence was incompetent, to which ruling the prisoner excepted.

This was manifest error. But for the reason assigned for excluding the question asked of Fox, we should be at a loss as to the possible reason of the action of the Criminal Court. If the bill of exceptions correctly narrates what occurred, the court seems to have supposed that there was an analogy between the written contract, which is the result of a long negotiation between two parties, and the confession in this case. Obviously there is no analogy whatever. When two parties meet to make a bargain respecting a controverted matter, it would throw no light upon the conclusion at last reached and made the basis of a settlement to know their respective pretensions on first opening the conference, and their successive approximations to an agreement. When the question arises, "What contract did they make?" it would be worse than useless to inquire what were their positions before they agreed at all, and, if they committed their agreement to writing and signed it, the written instrument is so plainly the best and only evidence of the understanding

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reached by the parties, that words would be wasted to show that all the disputations which preceded that conclusion are wholly irrelevant. But, when a person is giving a narrative of a past transaction, every word he uses, the very gestures and emphases he employs, go to make up the picture he gives of the event which he describes. If, after stating his recollection diffusely in words, the narrator should himself sit down and in his own language write down what he considered the substance of his narrative, no one, we think, would consider that this more studied statement was more likely to convey the image of the real event to the hearer than the diffuse terms before employed. In such cases, the more naturally and unpremeditatedly the words fall, the greater is the credit due to them. When, instead of writing down his statement in his own language, his words (or the *substance* of them) are taken down by a transcriber who admits that he changed the "language and the grammar" of the speaker, it must be very clear that there is room for mistake in the sense which the speaker desired to convey, and when a man on trial for his life offers to show that, not only has his language been changed, but his meaning perverted, it is grave error for a court of justice to silence him. We wholly approve the action of the court in admitting the confession of the accused. It is by no means an uncorroborated confession. Even if it were, there is abundant authority for holding it to be sufficient to warrant his conviction; but this question does not arise here, neither do we perceive that there was much probability of the prisoner making good the offer of proof which the court rejected. We cannot weigh probabilities, however. The prisoner asked to be allowed to prove what, if he had succeeded in doing (for his offer was very broad, and the practice of passing on such offers in this form is not to be commended), might have at least mitigated his guilt. He had the clear right to make the proof offered; and, for the refusal to permit him

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to attempt to make it, the judgment is reversed and the cause remanded for a new trial.

There is another matter, to which no attention was given by counsel, but which we cannot overlook. The indictment is for the murder of Celia Brown. The confession is of the murder of Cynthia Brown. As a person may be guilty of murdering Celia, and innocent of the murder of Cynthia, and as by no intendment, in the absence of evidence, can an inference be drawn that Celia and Cynthia are the same, we express the hope that, if this case again comes before us, this particular point will not be left in doubt. The other judges concur.

THE STATE OF MISSOURI, Respondent, *v.* BUD THORNTON, Appellant.

January 31, 1876.

Judgment reversed because the verdict was manifestly contrary to the testimony.

APPEAL from St. Louis Criminal Court.

Reversed, and defendant discharged.

J. W. Mitchell, for appellant, cited: Campbell *v.* Hood, 6 Mo. 211; Price *v.* Evans, 49 Mo. 396; Watts *v.* Douglass, 10 Mo. 676; State *v.* Burnside, 37 Mo. 343; Hart *v.* Leavenworth, 9 Mo. 629; Clemans *v.* Laveille, 4 Mo. 80; Scott *v.* Brockway, 7 Mo. 61.

J. C. Normile, Circuit Attorney, for respondent.

LEWIS, J., delivered the opinion of the court.

The defendant was convicted of grand larceny in the stealing of a watch. The chief witness for the prosecution testified substantially that, on a day during the St. Louis fair week in 1875, he bought the watch, believing it to have

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been stolen, from the defendant, whom he had never seen before; that he "looked around to find a policeman," but could not; that he gave the watch to a detective who came to his store, seven or eight days afterwards, having, in the meantime, "tried to find a policeman so that the owner could get it." All this occurred in one of the most active business localities in the city of St. Louis. The witness also stated that the person of whom he bought the watch wrote the name, "Henry Thompson," on a card, which was produced in evidence, and that, if the name on the card was not written by the defendant, then defendant was not the person of whom he had bought the watch. No other witness connected the defendant in any way with the larceny.

Against this flimsy testimony an expert in handwriting, upon a comparison of the writing on the card with the same words written by defendant in presence of the court, swore that it was impossible for both to have been written by the same hand.

Four witnesses swore that defendant was in the State of Iowa for two or three weeks, including the entire fair week, during which the State's witness had fixed the purchasing of the watch.

It would appear that the substantial testimony was all one way, and the verdict the other. The judgment will be reversed, and the defendant discharged. *State* v. *Mansfield*, 41 Mo. 470. The other judges concur.

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Jane A. Dix, Respondent, v. Walter B. Morris *et al.*, Appellants.

January 31, 1876.

Moneys received by an executor, proceeds of a sale of realty under a power in the will, whether the power was duly executed or not, are assets, and the sureties are liable for their misappropriation.

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Appeal from St. Louis Circuit Court.

Affirmed.

P. E. Bland and *J. A. Henderson*, for appellants, cited: Aubuchon *v.* Levy, 23 Mo. 99; Chambers *v.* Wright, 40 Mo. 482; Cholu *v.* Knapp, 1 Bradf. (N. Y.) 248; Foteaux *v.* Lapage, 6 Iowa, 130; Gregg *v.* Currier, 36 N. H. 204; Smith *v.* Bland, 7 B. Mon. (Ky.) 22; Stat. Ky. (1842) 240; Schwärtz' Estate, 2 Harris, 47; Laws of Penn. (Dunlap's), secs. 7, 8, 9, p. 585, sec. 20, p. 587; Smith's Heirs *v.* Smith's Admr., 13 Ala. 329; Ill. Stat., sec. 103, p. 1213 (1856); Foultz *v.* Prouse, 17 Ill. 493; McCoy *v.* Scott, 2 Rawle (Penn.), 222; Adams *v.* Adams, 4 Watts, 160; Gibson *v.* Farley, 16 Mass. 280; Wag. Stat., sec. 10–37, p. 92; Coil *v.* Putnam's Admr., 46 Mo. 51–55.

Slayback & Haeussler, for respondents, cited: Gamble *v.* Gibson, 59 Mo. 595

Bakewell, J., delivered the opinion of the court.

It appears from the record in this case that Henry A. Dix, by his last will, bequeathed all his property to his wife, Jane, *durante viduitate*, for her support and the support of her five children; if she should marry, the estate then unconsumed to be divided among the children, reserving to her the interest she would have had had he died intestate. The executor, Joel G. Harper, is authorized to sell all or any portion of testator's estate, real or personal, on such terms as to him shall seem good, in order to carry out the provisions of the will.

The executor makes final settlement in the Probate Court on September 22, 1873, and judgment is thereon rendered against him for $5,813.57, balance due the estate, which he is ordered to pay the plaintiff, the widow, according to the terms of the will. From this judgment no appeal is taken.

Execution is issued against the executor, and returned *nulla bona*. The proper proceedings are commenced against the sureties, which being dismissed against Edmund F.

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Dix, not served, judgment is rendered against Walter B. Morris, the other surety, and, on appeal to the Circuit Court, on trial, the court finds for plaintiff, against Morris, $6,220.51, renders judgment for the amount of the bond, $30,000, and orders execution for the amount above.

On trial in the Circuit Court, defendant offered evidence which, if admitted, would, as the other side then and there admitted, have shown that the balance found due by the executor, on final settlement, was wholly composed of rents collected, or the proceeds of real estate. This evidence was excluded as incompetent and irrelevant, and we are asked to reverse the case on the ground that the exclusion of this testimony was error.

This we cannot do. It is settled law in this State (*Gamble* v. *Gibson*, 59 Mo. 585) that rents collected by an executor, though he be not bound to collect, are, when collected by him, assets of the estate in his hands; and we think that moneys received by him as proceeds of the sale of realty, sold under a power given by the will, whether or no that power was duly executed by compliance with all its terms and conditions, are also assets of the estate beyond a doubt. It is argued that, in the case at bar, it does not appear that it was necessary to sell for the support of the widow and children. However this may be, the proceeds of the sale belonged to the estate, were clearly assets in the executor's hands, and his sureties are liable for the amount.

We see no error in the record. The judgment of the Circuit Court is affirmed. The other judges concur.

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HYDRAULIC PRESS BRICK COMPANY, Appellant, *v.* B. S. SAVILLE, Respondent.

January 31, 1876.

Where an account is assigned in such a way as to specify the character of the fund and an intention to pass the whole debt, it is such an assignment as to entitle the assignee to sue on it.

APPEAL from the St. Louis Circuit Court.

Reversed and final judgment entered.

G. A. Castleman, for appellant, cited: Beach *v.* Raymond, 1 E. D. Smith (N. Y.), 406; 2 E. D. Smith (N. Y.), 496; Mills *v.* Fox, 4 E. D. Smith (N. Y.), 220; 3 Stew. (Ala.) 344; Moore *v.* Penn, 5 Ala. 135; Agee *v.* Midlock, 25 Ala. 281; Beldu *v.* Muker, 47 N. Y. 307; Bank of Virginia *v.* Warren, 7 Hill, 91; Hoyt *v.* Thompson, 1 Seld. 320; Walker *v.* Mauro, 18 Mo. 564; Bank of Commerce *v.* Bogy, 44 Mo. 13; Blinn *v.* Pierce, 20 Vt. 25; Edwards *v.* Daly, 14 La. An. 384; Rodick *v.* Gandall, 15 Eng. Law & Eq. 221; Mandeville *v.* Welsh, 5 Wheat. 277.

E. P. Johnson, for respondent, cited: Ford *v.* Angelrodt, 37 Mo. 56, 57.

BAKEWELL, J., delivered the opinion of the court.

This is an appeal from a justice of the peace. The suit is for $135, said to be a balance due Maunder & Handcock by defendant, on account of house in McRee city, which account, it is claimed, was assigned by Maunder & Handcock to plaintiff.

On the trial in the Circuit Court, after proof of incorporation, plaintiff offered evidence tending to show the indebtedness of defendant to Maunder & Handcock, their copartnership, and the signature of the firm name by one of the firm to the following order:

St. Louis, Mo., Sept. 25, 1873.

MR. B. S. SAVILLE: Please pay to Hydraulic Press Brick Co. one hundred thirty-five dollars, being amount due us on your house in McRee city.

MAUNDER & HANDCOCK.

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The order was then offered and admitted, defendant objecting on the ground that it was no assignment of the account sued on. Evidence was offered tending to disprove items in the account of Maunder & Handcock against Saville to the amount of $55. Judgment was for defendant. The case was tried by the court without a jury.

If the court was right in admitting the order offered in evidence, it is manifest that judgment ought to have gone for plaintiff for at least $80, the amount admitted to be due by defendant, Saville, to Maunder & Handcock at the date of the alleged assignment of the order.

The only question in the case is whether or no the paper offered in evidence was such an assignment of the account as entitled plaintiff to sue on it.

We think the character of the fund is sufficiently specified in this order, and that it is such an order for a specific fund as plainly indicates an intention to pass the whole debt.

Judgment should have been for the plaintiff. The judgment of the Circuit Court is reversed, and judgment entered here against the defendant, in favor of plaintiff, for $80, balance confessedly due on the evidence, from Saville to the assignors of the account. The other judges concur.

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65	160
66	164

WILLIAM D. GRISWOLD, Appellant, v. AMERICAN CENTRAL INSURANCE COMPANY, Respondent.

January 31, 1876.

1. The building insured was described as a "two-story frame dwelling-house, on west side of King's Highway, near present terminus of Lindell avenue, St. Louis, Mo." After insurance and before destruction it was moved 200 feet north. The same description was as applicable after as before its removal. *Held*, that the effect of the removal upon the risk was not a question of law, but of fact, there being no condition or covenant in the policy that the building should remain where it was.

2. A effected insurance with B, and shortly afterwards caused a memorandum

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to be made in writing on the policy, with the consent of B, that the loss, if any, was to be paid to C. *Held*, that C was not the assignee of the policy, but was the party to whom the loss, if any, was payable.

3. If this memorandum was made as collateral security to C, for a debt owing him by A, payment of the debt will, without more, enable A to recover to his own use any loss on the policy.

4. During the time when the debt to C continued unpaid, A sold to D the property insured, informed B thereof, and caused a memorandum to be made on B's policy register, stating the value of the policy and that it was transferred to D. *Held*, that this memorandum, made by B, operated as an assignment of the policy to D.

5. The debt to C was paid by D, after which the property was destroyed by fire. *Held*, that D was entitled to recover the loss.

Appeal from the St. Louis Circuit Court.

Reversed and remanded.

Bell & Thompson, for appellant, cited: Fogg *v.* Middlesex Ins. Co., 10 Cush. (Mass.) 346; Grosvenor *v.* Ins. Co., 17 N. Y. 391; Solmes *v.* Rutgers Ins. Co., 40 N. Y. 416; Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 435.

Rankin & Hayden, for respondent, cited: Hale *v.* M. Mutual Fire Ins. Co., 6 Gray (Mass.), 169; Fogg *v.* Middlesex Mutual Fire Ins. Co., 10 Cush. (Mass.) 337; Macomber *v.* C. M. Fire Co., 8 Cush. (Mass.) 135; Sillem *v.* Thornton, 3 El. & Bl. 868; Robinson *v.* M. C. Mutual Ins. Co., 3 Dutch. (N. Y.) 134; Clark *v.* M. Ins. Co., 2 Woodb. & M. 472.

Gantt, P. J., delivered the opinion of the court.

This suit was on a policy of insurance on a dwelling-house of Cabanné against loss by fire for a period of five years from May 24, 1870. The premium for the whole time, $80, was paid when the policy was issued. The sum insured was $4,000. The property was described as "his two-story frame dwelling-house on west side of King's Highway, near present terminus of Lindell avenue, St. Louis, Mo." Cabanné was, in May, 1870, the owner of the property. On August 6, 1870, he borrowed money from Fuchs, executed to him a deed of trust conveying land adjoining that on which the house stood, or the

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land itself, and on August 8, 1870, the following memorandum was made on the face of the policy: "Aug. 8th, 1870. Loss, if any, made payable to F. Fuchs. G. T. Cram, Sec'y." Fuchs seems to have had possession of the policy from this date to July, 1875. In September, 1871, Cabanné sold all his land on the west side of King's Highway to Griswold, subject to the incumbrance in favor of Fuchs, and attempted to put Griswold in his place, in all respects, in relation to the land and this policy of insurance. He says he wished to turn over to Griswold "all the papers." At this time Fuchs seems to have been in Europe, and Cabanné appears to have forgotton that he had the custody of the policy. Not being able to find it, he thought it was lost or mislaid. In pursuance of his purpose to substitute Griswold for himself, in respect of the land and its incumbrances, he went to the office of defendant in September, 1871. He has no accurate memory of what he did there. He says in general terms that he did whatever was required of him; and what that was we may infer from the following entry on the policy register of defendant: "No. 3550. Name, J. Charles Cabanné. Term, five years. Commencement of risk, May 24, 1870. Expiration of risk, May 24, 1875. Amount insured, $4,000. Rate, 2 per cent. Amount of premium, $80. On his two-story frame dwelling on west side of King's Highway, near present terminus of Lindell avenue, St. Louis, Mo. August 8, 1870. Loss, if any, made payable to F. Fuchs. G. T. Cram, Sec'y, etc. September 25th. Transferred to Wm. D. Griswold." In November, 1872, the house was totally destroyed by fire. Just before the fire, it had been removed from the spot it occupied when insured to another, some 150 feet north of it. In its new position it was still "on the west side of King's Highway, near the present terminus of Lindell avenue."

Proof of loss was made by Griswold, and, payment being refused, suit was brought on the policy, in the name of

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Fuchs. In July, 1875, Griswold paid to Fuchs the debt secured by the deed of trust and the policy, and received from him the latter paper. On November 17, 1875, an amended and supplemental petition was filed in the name of Griswold, and upon it the suit was tried. The facts above detailed appeared in evidence, and the court declared that upon them the plaintiff could not recover. The plaintiff excepted, and appealed to this court. The question is: Did the facts in evidence tend to establish a right of recovery in the plaintiff?

We have no doubt that if, at any time after August, 1870, and before September, 1871, the property insured had been destroyed by fire, Fuchs might have recovered for the loss. He was not, in strictness, the assignee of the policy. The relations of insurer and insured continued between Cabanné and the defendant, notwithstanding the memorandum of August 8, 1870. The effect of the memorandum was to make Fuchs the payee of the loss, if any, by fire, contemplated by the contract subsisting between Cabanné and the defendant; and any act done by Cabanné to vitiate the insurance would defeat Fuchs' right to receive the loss. *Fogg et al.* v. *Middlesex Mutual Fire Ins. Co.*, 10 Cush.(Mass.) 337; *Hale* v. *Mechanics' Mutual Fire Ins. Co.*, 6 Gray (Mass.), 169. Although Fuchs must sue in his own name, in case of loss, yet Cabanné may be regarded as his trustee for certain purposes. The memorandum designating Fuchs as payee was made when he became the creditor of Cabanné, and the incumbrancer of the property; and his interest in the policy terminated when his debt was paid by the owner of the property, whether Cabanné or his vendee. Prior to this payment, Fuchs was the only person in whose name suit could be brought to recover the loss. When this payment was made, it operated a transfer to Cabanné, or his vendee, of all Fuchs' interest in the policy. *Holland* v. *Smith*, 6 Esp. 11.

2. When, on the 25th of September, 1871 (the *year* is

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fixed by the testimony of Cabanné, the *day* by the memorandum on the policy register), Cabanné visited the office of defendant, he had sold the property insured to Griswold. We are forced to infer, from what appears, that he informed the defendant of this, and signified his wish to substitute Griswold for himself in the policy. We are forced also to infer that the defendant assented to this, waiving all objection founded on the interval which had elapsed since the sale. Of course the only effect of such a substitution was to continue Fuchs, so long as the debt to him was unpaid, the payee of the loss, to recognize Griswold as the owner of the house and policy, subject to this debt, and as the beneficiary of the policy for the purpose of its discharge. Griswold was interested directly in keeping the insurance alive. The defendant was at liberty, as suggested by its counsel, to decline continuing the insurance after Griswold took Cabanné's place, but it did not do this; on the contrary, it assented to the transfer of the policy to Griswold (subject always to Fuchs' incumbrance), and the consideration of this assent was the continuing of the insurance. Otherwise, a ratable part of the premium paid at the commencement of the risk might have been claimed by Cabanné or his vendee. It is, of course, a pity that so much was left to inference. A very little attention would have made unequivocally plain much which is now to be gathered from *indicia*, more or less faint, of the meaning of the parties; but we are of opinion that all the facts on which we found our judgment may be fairly inferred from what this record discloses. On September 25, 1871, no memorandum was made on the policy itself. It seems to have been in the hands of Fuchs, and he was abroad. The entry on the register was very persuasive evidence of the intention of the defendant, and we have no doubt of it. It was not essential that this intention should be manifest by an instrument of writing signed by defendant. In this respect the insurance company and an individual are upon the same foot-

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ing; and a contract may be inferred from circumstances in the case of the one precisely as in the case of the other. Sec. 6 of ch. — of Gen. Stat. of Mo. —; *Security Fire Ins. Co.* v. *Ky. M. and F. Ins. Co.*, 7 Bush. (Ky.) 81; *Kennebec Co.* v. *Augusta Ins. and Bk. Co.*, 6 Gray (Mass.), 204; *Constant* v. *Ins. Co.*, 3 Wall. jr. 313; *Mar. Dock and Mut. Co.* v. *McMillan & Son*, 31 Alab. 711; *Baptist Church* v. *Brooklyn Fire Ins. Co.*, 18 Barb. 75; *Com. Mut. Mar. Ins. Co.* v. *Union Mut. Ins. Co.*, 19 How. 318, 321.

3. The point which has given us most difficulty is that made by defendant's counsel on the effect of the removal of the house from the position it first occupied. He claims that this removal changed the risk, or conclusively and necessarily increased it. If so, the underwriter is discharged; for it is plain that if another contract is put in the place of that he has made, or if, without changing the nature of the risk, it be increased in degree, there is an end to his liability. We do not cite authorities on a point so well settled and having so little authority for its support. But we do not see that the risk was necessarily either changed or increased by the removal of the building, bodily, from one spot to another. It has been decided that, if a house be thrown down, a policy against fire effected on the *house* will not protect the owner of the mass of rubbish which results from its fall, if that mass be consumed by fire. But that is a different case from the one we have before us; nor do we think there is any analogy between the case at bar and that of goods insured in one warehouse which are removed to, and destroyed by fire in, another. They are insured as being in a warehouse which perhaps remains untouched by fire, and are destroyed by a conflagation occuring in that to which they are removed. The description of the goods is changed, and so is the risk to which they have been exposed. Both these changes are manifest and unequivocal. In the case at bar, the property insured was as exactly within the

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description contained in the policy after as before its removal, and the effect of the removal upon the risk, either to increase or change it, is, we think, a question of fact, not of law.

4. The counsel for respondent makes the point in his answer and in his argument that it was one of the conditions of the policy, declared in that instrument, that the house should not be removed from its place. We have examined the policy in vain in search of this condition. It is quite true that houses are ordinarily stationary, and until recently their removal from place to place was almost unknown. Of late years such removals, both here and elsewhere, have not been infrequent, and we are rather surprised that the effect of a fire occurring during such removal, or after it, on a policy against loss by fire, has not before this day occupied the attention of courts of justice. We think the instruction given by the Circuit Court was too broad, and reverse the judgment, remanding the case for further proceedings. All the judges concur.

GANTT, P. J., delivered the opinion of the court, on a motion for a rehearing.

The counsel for respondent have filed a motion for a rehearing, in which they claim that this court has mistaken both the facts and the law presented by this record. We have examined carefully the record, and the reasons for a rehearing, and, as briefly as we can, give our reasons for overruling the motion.

The first proposition stated and advocated is that there is no evidence tending to show that respondent agreed to accept Griswold as the insured party in the place of Cabanné. The counsel for respondent do not state this proposition precisely as we do, but if the difference of statement adopted by them be intentional, and they mean to concede the proposition as stated by us, they give up the case. We proceed to consider the proposition as we have stated it, and, as we think, to refute it.

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The facts are that the policy was issued in May, 1870, for five years, in the sum of $4,000, in favor of Cabanné; that he paid the premium for the whole time; that in August, 1870, having borrowed money from Fuchs and secured it by a mortgage on land, he caused a memorandum to be made by the secretary of respondent, on the face of the policy, and also on the policy register of respondent, that the loss, if any, should be paid to Fuchs; that in 1871 Cabanné sold to Griswold both the tract mortgaged to Fuchs and that on which the insured dwelling stood, and that, wishing to transfer to Griswold all the muniments of title, and papers held by him in connection with the property sold, he went to the respondent's office, on September 21st, apparently not remembering that Fuchs had the physical custody of the policy as well as the beneficial interest in it. It was important to notify the company of the sale to Griswold, in order to prevent the insurance determining upon the sale. If it had so determined, and a loss had occurred, the security of Fuchs would have been impaired *pro tanto*, and Griswold, the purchaser of the land subject to Fuchs' mortgage, would have been a loser. If Griswold were a reputable person, there would, of course, be no probable difficulty in continuing the insurance. But of this the company was the sole judge, and if it did not wish to continue the insurance to Griswold, who had taken Cabanné's place in respect of the land, it might refuse to do so, but would then become liable to refund to Cabanné more than two-thirds of the premium paid in 1870 for the whole term. Such was the position of the parties. Each must be supposed to have understood it. It is true that Cabanné cannot remember what he said when he went to the company's office; but it cannot be doubted that he visited it in the interests of Griswold. These required the communication to respondent of the sale to Griswold, and the arrangement that, as he had succeeded to Cabanné's rights in respect of the land, he should succeed to Cabanné's

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right in respect of this policy. Cabanné declares that he did everything required of him; but, as he is unable to speak with definiteness, if we had no further evidence we should be entirely in the dark on this point. But we look at the policy register of the respondent and see that, on September 21st (1871) this policy was by respondent's consent transferred to Griswold. The interpretation of this entry is the subject of inquiry. What did it mean?

Two interpretations are proposed by respondent. One was offered orally at the hearing. It was that this entry really meant nothing at all, as far as respondent was concerned; that it did not imply that Griswold was insured, as Cabanné had been, and that it was, indeed, no more than a mere unmeaning compliance by respondent with the ignorant wishes of Cabanné; that he desired the performance of a perfectly idle and harmless ceremony, and that respondent, with a smile at his simplicity, gratified his silly wish, well knowing that Griswold thereby obtained no insurance, although respondent, by this juggle, retained an unearned premium. In their motion, counsel for respondent speak with some bitterness of the scant justice which insurance companies ordinarily receive at the hands of juries. Unfortunately there is some room for such complaints; and there are thoughtless men who justify the prejudice which leads to this injustice by imputing to insurance companies a course of almost uniform disingenuousness in their dealings with their customers. We consider the imputation unfounded and the prejudice unjust; but we cannot imagine anything more calculated to show that we are wrong in both particulars than the interpretation here attempted of the entry made on the policy register of respondent on September 21, 1871. We reject that interpretation as totally inadmissible. It violates a fundamental rule of construction in that it declares that a writing capable, and naturally indicative, of a most important meaning has no significance at all. This is what is termed "*pessima interpretatio.*"

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Another attempted interpretation is that the entry means that Griswold took the place, not of Cabanné, but of Fuchs, in respect of this policy. But this is impossible. Fuchs was in Europe. Cabanné could not have deprived Fuchs of the right to receive the sum insured, in case of a loss, except by forfeiting the policy altogether; the very thing to prevent which he went to respondent's office at all. On the policy register, in juxtaposition with this entry of September 21, 1871, was the appropriation of the sum insured to Fuchs—not of part of it, but the whole. What could have possibly been the meaning of the statement that this policy was transferred to Griswold? Certainly not that he thereby was substituted for Fuchs; *that* was palpably out of the question. Unless he took the place of the underwriter, he must of necessity take the place of Cabanné, and, of course, it is idle to talk of the possibility of his taking the place of the underwriter. On the other hand, what more natural than that the transfer, operated by the joint consent of Cabanné and the respondent, should be intended to put him in the place of Cabanné? If, indeed, it were a fact that he had no revertionary interest in the property insured, or that he had no reason for desiring the extinguishment of Cabanné's debt to Fuchs, we would be forced to conclude that the parties were doing a very empty thing. But, knowing what the facts were, and seeing the motive and the explanation of all that was done, we cannot avoid the conclusion that the presumption of fact is very strong that respondent was fully apprised of the sale to Griswold, and, in consideration of the continuance of the policy and the avoidance of all question of the return of more than two-thirds of the premium paid by Cabanné, assented to the substitution of Griswold for him. This is our view of the *evidence* in the case. Coming to the supposed mistake as to the law applicable to the facts, we find that what is said by respondent's counsel on this head resolves itself into a denial that, in point of fact, the respondent accepted

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Griswold as the vendee of Cabanné, and the transferee, with the consent of both Cabanné and respondent, of this policy. We will not go over again the demonstration we have made that this, and no other, is the interpretation of the entry made on respondent's policy register in September, 1871; and we confess ourselves at a loss to perceive for what purpose the extract from the opinion of the court in 8 Gray, 28 (*Loring* v. *Manufacturers' Insurance Company*), is quoted by the counsel for respondent. But, as that case is really illustrative of the principles which we had in view in reaching the conclusion already announced in this cause, and as the extract made by respondent's counsel is somewhat obscured by being separated from its context, we here state the case with some fullness, and quote the entire passage in which the sentence cited occurs.

In that case, by a policy dated June 11, 1853, the insurance company insured Beaumont in the sum of $4,000 on one-half of the Mitchell mill. On June 12, 1853, a memorandum was made on the policy that, in case of loss, the money was to be paid to Loring, mortgagee. On July 8, 1853, Beaumont conveyed to Hinckley, subject to the mortgage to Loring. Of this conveyance no notice was given to the company, and no memorandum made on the policy or policy register. A loss having occurred, Loring sued, and, there being a condition in the policy that a conveyance of the property without the consent of the company should terminate the risk, he was defeated. It being announced at the trial that he must show that the company had been apprised of this sale to Hinckley and had assented to it, he attempted to make this appear by giving evidence that, on June 18, 1853, Beaumont had taken out another policy with defendant, for $2,400, on three-tenths of the Mitchell mill; that, on the same day, a memorandum was made on the face of this policy that $1,000 of the loss, if any, was to be paid to Sawyer; and that, on July 8, 1853, having sold "*this property*" to

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Hinckley, Beaumont transferred the policy to him, subject to the rights of Sawyer, with the assent of the company. Loring's counsel contended that this entry on the books of the defendant, and on the policy of June 18, 1853, by the officers of defendant, was evidence that the defendant had knowledge, not merely of the sale of the three-tenths of the Mitchell mill, but of the sale of the *whole interest of Beaumont* in the mill to Hinckley; and, consequently, as they argued, defendant had notice of the sale to him of the interest covered by the first policy, which was one-half of the mill. The court ruled otherwise. Judge Dewey said: "Whether, if it could be read as a notice of the sale of the whole, *such notice, without assent of the defendant to continue the policy as to the other portion previously insured, could avail, would present a serious and probably an insuperable difficulty; as it is the assent of the defendants to the continuance of the policy, after they are notified of the sale, that continues the policy for the benefit of the purchaser.* There is nothing anywhere to signify the assent of the defendants to continue *any other* policy than that of 18th June, which was upon a distinct three-tenths of the mill."

Now, we call attention to the fact that, in the case at bar, Cabanné, after effecting insurance on his house, ordered the loss, if any, to be paid to Fuchs' mortgagee, and then sold the property subject to the mortgage. In the case reported in 8 Gray, Beaumont, after effecting insurance on his mill, ordered the loss, if any, to be paid to Loring's mortgagee, and then sold the property subject to the mortgage. But Beaumont failed to report this sale to, or to cause the policy to be transferred to his vendee by, the company. Cabanné carefully did this, and this is the distinction between the two cases. What was the effect of this act which Cabanné performed, and Beaumont omitted, in the opinion of the Supreme Court of Massachusetts? It was, in the language of Judge Dewey, already quoted, "to continue the policy for the benefit of the purchaser." But how for *his*

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benefit, seeing that, in case of loss, another person was designated as the payee of it? Obviously because in such case the insurance company would pay a debt which would otherwise be a charge on the land denuded of the building. This is all that appellant needs here. We suppose that it will not be seriously denied that the respondent intended the natural consequences of its act when making the entry which has been considered. We have seen what is the necessary interpretation, the irresistible meaning of that entry or that act. When it declared that the policy was transferred to Griswold, this declaration, made at Cabanné's instance, could only mean that Griswold was substituted in the policy for Cabanné. It could not mean that he was substituted for Fuchs, for no one but Fuchs was competent to make such substitution, and the only possible remaining meaning was: Griswold, having succeeded to Cabanné's relations to the land, was substituted for him in the policy. The motion for a rehearing is overruled, all the judges concurring.

LIZZIE COOLIDGE, Respondent, v. THE CHARTER OAK LIFE INSURANCE COMPANY, of Hartford, Conn., Appellant.

January 31, 1876.

1. **Where an applicant for life insurance had an ordinary cold at the time of his application, which was known to the local agent of the company and its medical examiner, and which did not cause his death, their knowledge was the knowledge of the company, and the company is estopped to set this up as a defense, and the policy is binding, though the existence of the cold made the risk greater than an ordinary one.**
2. **Notice to the local agent of the company, for the purpose of placing insurance, is notice to the company.**

APPEAL from St. Louis Circuit Court.

Affirmed.

Knox & Klein, for appellant, cited: Mutual Benefit Life Ins. Co. v. Miller, 39 Ind. 475; Valton v. National Loan

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Fund Ins. Co., 20 N. Y. 32; Miles *v.* Connecticut Mutual Life Ins. Co., 3 Gray (Mass.), 580; Vasa *v.* Eagle Life and Health Ins. Co., 6 Cush. (Mass.) 42; Kelsey *v.* Universal, etc., Ins. Co., 35 Conn. 225; Lorick *v.* Home Life Ins. Co., 2 Dill. 160; Bliss on Life Ins., secs. 39, 49, 58: Hallabird *v.* Atlantic Mutual Life Ins. Co., 2 Ins. L. J. 588; Bartrau *v.* Phœnix Mutual Life Ins. Co., 3 N. Y. (S. Ct.) 575–579; Mutual Benefit Life Ins. Co. *v.* Miller, 2 Ins. L. J. 100; Lee *v.* Guardian Life Ins. Co., 2 C. L. J. 495; 4 H. L. Rep., Cas. 503–514; Campbell *v.* New England Mutual Life Ins. Co., 98 Mass. 381; Horn *v.* Amicable Mutual Life Ins. Co., 64 Barb. 81; Conover *v.* Mass. Mutual Life Ins. Co., 1 C. L. J. 597; May on Ins., sec. 185; Mutual Benefit Life Ins. Co. *v.* Wise, 34 Md. 582; Britton *v.* Mutual Benefit Life Ins. Co., 3 N. Y. (S. Ct.) 442; Tibbetts *v.* Hamilton Mutual Life Ins. Co., 3 Gray (Mass.), 569; Chase *v.* Hamilton Ins. Co., 20 N. Y. 52; Geach *v.* Ingalls, 14 M. & W. 95; Dewees *v.* Manhattan Ins. Co., 35 N. J. 366; Keenan *v.* Dubuque, etc., Ins. Co., 13 Iowa, 375; Lewis *v.* Phœnix Mutual Life Ins. Co., 39 Conn. 100; Ryan *v.* World Mutual Life Ins. Co., 4 Big. 627; National Ins. Co. *v.* Mink, 4 Big. 240; Baker *v.* Home Life Ins. Co., 4 N. Y. (S. Ct.) 582; Smith *v.* Ætna Life Ins. Co., 5 Lans. (N. Y.) 545; Smith *v.* Ætna Life Ins. Co., 49 N. Y. (Ct. of App.) 211; Scharg *v.* Germania Life Ins. Co., 18 Minn. 448; Traill *v.* Baring, 4 Gif. 485; Mutual Benefit Life Ins. Co. *v.* Holbihoff, 4 Big. 375.

R. S. Voorhis, for respondent, cited: Reid *v.* Piedmont & Arlington Life Ins. Co., 58 Mo. 421; Curner *v.* Continental Life Ins. Co., 4 Big. 648; Hale *v.* Ins. Co., 32 N. H. 295; Miller *v.* Mutual Benefit Life Ins. Co., 31 Iowa, 216; Pilkington *v.* National Ins. Co., 55 Mo. 172; Cape Girardeau & Bloomington M. T. G. R R. Co. *v.* Renfroe, 8 Mo. 265; Rippstein *v.* St. Louis Life Ins. Co., 57 Mo. 86; Wise *v.* Mutual Benefit Life Ins. Co., 2 Big. 46; Wilkins *v.* Connecticut Mutual Life Ins. Co., 30 Iowa, 119;

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Shattock *v.* Shawe, 1 B. Mon. (Ky.) 498; Watson *v.* Mainwaring, 4 Taun. 163; Vose *v.* Eagle Life and Health Ins. Co., 6 Cush. (Mass.) 42; Ross *v.* Bradshaw, 1 Black. W. 212; 2 Marshall on Ins. 773; Richard *v.* Manhattan Life Ins. Co., 31 Mo. 518; Keine *v.* Home Mutual Fire and Marine Ins. Co., 42 Mo. 38; Baldwin *v.* Chouteau Ins. Co., 56 Mo. 151.

BAKEWELL, J., delivered the opinion of the court.

This suit is on a policy of insurance issued by defendant, insuring the joint lives of plaintiff and her husband, James K. Coolidge, for $2,000. The policy is dated January 3, 1870, countersigned and delivered at Topeka, Kansas, the place of residence of the assured, on February 26, 1870. The application was made on December 29, 1869, and James K. Coolidge died on June 17, 1870. By the terms of the policy, the sum mentioned was payable to plaintiff three months after proofs of loss.

The petition states everything necessary to a recovery. The answer denies every material allegation of the petition, and further says that, by the terms of the policy, it was to be void if any answers or declarations made in the application of James K. Coolidge or his wife were untrue, and that the following answers and statements in these applications were untrue when made: (1) that James K. Coolidge was in good health; (2) that he was not then afflicted with bronchitis; (3) that he was not then afflicted with any disease or disorder of any kind. The answer says that plaintiff and James K. Coolidge knew these answers were false and fraudulent when they made them; that defendant had no knowledge on the subject except that furnished by these answers, and that deceased had bronchitis.

The replication says that defendant did not rely upon the statements of plaintiff and her deceased husband, but upon the statements of the medical examiner of defendant, who reported him sound after examination; says that the answers that deceased had not bronchitis, and had no disease or

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disorder of any kind, at the date of his application, were true; and that defendant then examined him, and had full knowledge of his physical condition.

In addition to the statements of the amended answer as above set forth, it contained, when filed, certain words and figures which were, on motion of plaintiff, stricken out; and this action of the court below is complained of as error. But we see no error in this action of the Circuit Court. These words and figures set up no defense not, in every respect, sufficiently set up in the answer without them. They merely tend to confuse the pleading. They are to the effect that the statements of the applicants were false, and known to the applicants to be so; that deceased, at the time of the application, was afflicted with a disease or disorder besides bronchitis (what disease is not stated), of which he continually languished, and, so languishing, died of it at last; that the application on December 29, 1869, was for a policy of $1,000 only; and that in January, 1870, applicants, without answering any further questions, applied for an increased policy of $1,000, and represented the deceased as well at the time of said application, well knowing that he was then worse, and under medical advice; and that the policy sued on was issued by defendant on the faith of this second application in January, 1870. There is no allegation anywhere, in the parts of the answer stricken out, of any conspiracy between the applicants and the agents of the company to defraud.

There was a verdict and judgment below for the whole amount claimed, and from this verdict and judgment defendant appeals.

In the argument many points were made as to exceptions to evidence, but, on looking at the record, we find no exceptions to evidence saved.

It is earnestly insisted by appellant that there is no evidence whatever to support the verdict. With the question of the preponderance of evidence we have nothing to do.

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There is evidence on which the jury might well, under the instructions, find as it did. We may say, for the satisfaction of counsel, that the evidence has been carefully examined, and we see nothing in the whole case from which corruption or undue bias on the part of the jury could be suspected; but this is a question for the trial court alone. That court has not disturbed the verdict, and it would be illegal for us to do so, unless it should appear that there was no evidence at all as to at least one material fact necessary to be proved.

At the instance of plaintiff the jury were instructed that, if the deceased at the time of his examination had an ordinary cold, which fact was made known to the agent of the company and to its medical examiner, their knowledge was the knowledge of the company; and if the fact of such cold was communicated to the officers of the company at Hartford by the medical examiner, in his certificate of examination, defendants are estopped to set up such fact as a defense; and, further, that though the risk upon the life of the deceased was greater than an ordinary one, in consequence of a cold he had when examined, yet, if the policy sued on was issued with full knowledge of all the facts, it is binding on them, and they cannot bar plaintiff's recovery by setting up this cold.

These instructions were founded upon evidence in the case, and were correct statements of the legal principles applicable to that evidence.

At the instance of defendant the court instructed the jury that they could not find for the plaintiff if, from the evidence, they believed in the existence of any of the following facts:

1. That on February 26, 1870, Coolidge was seriously sick of the disease of which he died, and did not communicate this fact to defendant.

2. If, on December 29, 1869, deceased was afflicted with the disorder of which he died.

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3. If any fact existed on February 26, 1870, which increased the risk on December 29, 1869, and was not communicated by Coolidge to the company.

4. If, before February 26, 1870, deceased was sick of a mortal disease of which he died, and this was not told to the company before February 26, 1870.

These instructions put the law applicable to the case fairly before the jury, and were all that defendant could ask. It complains of the rejection of nine other instructions offered by defendant. Of these, the instructions numbered one and eight are mere repetitions of instructions given; instructions two, five, six, and seven either make a distinction between being under medical advice and being sick, and tell the jury that, whether sick or not, the fact of being under medical advice is material to be communicated to the insurance company, or they are a mere repetition of instructions already given. These instructions could have served no other purpose than that of confusing the jury, and were properly rejected.

Instructions four and nine are both to the same effect—that if deceased believed he answered the questions in his application truthfully, still, if he was in fact, at the time, afflicted with any disease or disorder, he cannot recover. These instructions were properly refused, as they were inconsistent with those granted for the plaintiff, and would have compelled the jury to find for the defendant if deceased, at the time of his examination, had a slight cold, of which defendant had notice and of which the assured fully recovered before the delivery of the policy.

Instruction three is, in view of the evidence, ambiguous. There is evidence tending to show that on December 29, 1869, deceased had a slight cold, of which defendant's agents—both those at Topeka, Kansas, where the application and examination were made, and those at Hartford, Connecticut, the home office—had full notice; that the home officers directed that the policy should not be

delivered until applicant was well of his cold; that he recovered of his cold, and that the agents at Topeka reported the recovery before delivering the policy; and that this cold was entirely distinct from, and had no connection with, the disease of which the insured died. There is also evidence tending to show that deceased died of galloping consumption, directly connected with the slight cold of December 29th, which developed into laryngitis, from the larynx descended to the bronchial tubes, and thence to the lungs. Now, this instruction reads thus: "Even if the jury believe that Gring was the agent of the defendant, and said agent knew of Coolidge's sickness, yet, unless the jury shall believe that said sickness was communicated to the defendant, the plaintiff cannot recover in this action." It does not appear what sickness is referred to.

But, independently of this, the instruction was properly refused. Gring was the agent of the company at Topeka for the purpose of placing insurance, and, in the absence of allegations of fraudulent conspiracy between applicants and Gring to cheat and deceive the company, notice to Gring was notice to the company of any matter within the scope of his agency. But there is no allegation whatever, in the pleading, of any fraudulent conspiracy to which Gring was a party, and nothing whatever in the case as presented to warrant any such instruction as to the effect upon the company of notice to Gring.

On the whole record, we see nothing that will warrant a reversal of the judgment, and, with the concurrence of the other judges, it is affirmed.

CASPAR VIELHABER *et al.*, Respondents, *vs.* GOTTLIEB EYERMANN, Appellant.

February 14, 1876.

1. When an executrix, having commenced a suit, marries, she cannot further prosecute the suit in any capacity. Her disability is not cured by an order,

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making her husband a co-plaintiff. A party must recover by the right in which he sues, or not at all.

2. An order of the probate court, that "no further process issue" against an executor or administrator, is not equivalent to a final settlement.

3. A demand, not inventoried, belonging to an estate will not be vested in the widow by an order appropriating to her, in lieu of provisions, the balance of assets appearing upon a settlement of the estate. Such a demand would go to an administrator *de bonis non*, if one should be appointed.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

H. D. Laughlin, for appellant.

Farish & Griffin, for respondents, cited: Hyde *v.* State, 7 Wend. 354; Spaun *v.* Jennings, 1 Hill (S. C.) Ch. 324; Hudson *v.* Wallace, 1 Rich. Eq. 23; Morton *v.* Hatch, 54 Mo. 412.

LEWIS, J., delivered the opinion of the court.

In July, 1870, Charles Baer died, leaving a widow, Maria Eva, one of the present plaintiffs, to whom, by will, he bequeathed all his real and personal property, except $1 to each of his children, and whom he made his sole executrix. The will was probated, and letters were duly granted to the widow, on July 25, 1870.

On December 23, 1870, Mrs. Baer, as executrix, commenced this suit before a justice of the peace, on a demand due her deceased husband's estate. The justice gave her judgment, from which defendant appealed to the Circuit Court. Pending proceedings in the latter, on February 21, 1872, the plaintiff's marriage with her present co-plaintiff was suggested by herself and entered of record, with an order making the husband a party plaintiff.

At the trial the plaintiffs introduced in evidence a certified transcript of record from the Probate Court, showing that on December 11, 1871, the executrix there reported the fact of her marriage, and made a settlement, showing a balance in her hands of $194.85, which sum the court thereupon appropriated to her in lieu of provisions, etc. An order was then made, upon her motion, "that no further process issue against her as such executrix, except it be

upon the application of some person interested." It does not appear from the record that there was ever any further or final settlement of the estate.

Judgment was rendered against defendant in the Circuit Court, from which, after unsuccessful motions for new trial and in arrest, he appealed to the general term, where the judgment was affirmed.

It is provided in Wagner's Statutes, at page 71, section 5, that "no married woman shall be executrix or administratrix," and, at page 75, section 34, that, "if any executrix or administratrix marry, her husband shall not thereby acquire any interest in the effects of her testator or intestate, nor shall the administration thereby devolve upon him, but the marriage shall extinguish her power, and her letters be revoked."

When Mrs. Baer married she ceased to be executrix; and, when that fact was entered upon the record in this cause, it was erroneous for the court to permit her to proceed further as a plaintiff representing her former husband's estate. She had been before the court in her representative capacity, and in none other. In *Burdyne* v. *Mackey*, 7 Mo. 374, it was held that, "if an executor or administrator brings suit in a representative capacity, he cannot recover by virtue of any individual interest he may have in the matter in controversy." But, even if this rule were reversed, the facts in the present case would not have justified a further prosecution of the suit by Mrs. Vielhaber and her husband, the present plaintiffs.

The trial in which her supposed individual interest was developed did not occur until more than a year after the suggestion of marriage and Vielhaber's entry of appearance as a co-plaintiff. The order of the Probate Court was not equivalent to a final settlement of the estate. By its very terms the administration was kept open, and might be actively proceeded with "upon the application of some person interested." There was no order of distribution.

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It does not appear that the demand sued on was ever inventoried or charged against the executrix, or that it constituted any part of the balance appropriated to her by the Probate Court. On the contrary, as it was an unsettled demand, the order transferring it to her, if so intended, should have described the claim itself. When the marriage was suggested, and Mrs. Vielhaber was permitted to proceed with the suit as in her own right, the two years had not expired in which creditors might prove their demands against the estate. This claim was one of the assets to which they had a right to look, and which would yet, for aught that appears in the record, properly belong to an administrator *de bonis non*. A judgment in favor of the present plaintiffs would be no protection for the defendant against a suit on the same demand by such an administrator, if one were appointed. *Lessing* v. *Vertrees*, 32 Mo. 431.

The judgment was, therefore, erroneous and must be reversed and the cause remanded. Judge GANTT concurs; Judge BAKEWELL not sitting.

Upon a motion for rehearing, LEWIS J., delivered the opinion of the court.

A motion for rehearing has been filed in this cause, in which, assuming that "the court, in its opinion, has overlooked or failed to note essential and material facts," the point is made that, when the original plaintiff's marriage was suggested in the Circuit Court, the two years of administration of Baer's estate had already passed. This is a mistake of the counsel. The letters were granted in July, 1870. The suggestion of marriage was made on February 21, 1872, as appears by the record. The case was tried in March, 1873—more than a year afterwards.

There is nothing in the suggestion that Vielhaber was made a co-plaintiff by agreement of parties. That agreement gave him a right to coöperate in the prosecution of the suit. But it could not confer upon him a right of

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recovery, which the law withheld under the circumstances of the case.

The point presented with reference to the order of "no process" and the appropriation to the widow is sufficiently answered in the opinion already delivered.

For the purposes of this case it is of no consequence whether the demand belonged to Mrs. Vielhaber in her individual right or not. She had sued upon it as executrix, and could not, in the same proceeding, recover by virtue of a different title. Having ceased to be executrix, she could not then recover in any capacity, unless by a new suit, or its equivalent in an admissible amendment. The introduction of Vielhaber was no such amendment, because the record still shows that she was suing as executrix.

It may be true that there was no necessity for the appointment of an administrator *de bonis non*, so far as the estate itself was concerned. But there is always a necessity that parties shall appear before the court in the characters by which they expect to recover. *Burdyne* v. *Mackey*, 7 Mo. 374. Judge GANTT concurring, the motion for rehearing is overruled; Judge BAKEWELL not sitting.

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JOHN H. TERRY, Respondent, *v.* WILLIAM T. HICKMAN *et al.*, Appellants.

February 14, 1876.

Defendant executed his negotiable promissory note to an insurance company for a policy which he afterwards ascertained to be fraudulent and worthless. Plaintiff purchased the note, before maturity, for less than half its face value. Whether plaintiff had notice of the alleged fraud, and whether he purchased the note for cash, or took it as collateral for an antecedent debt, were questions in dispute. *Held*, 1. It was competent for the defendant to show that the insurance company had no real capital. 2. If two or more facts are necessary to establish a certain conclusion, the court may, in its discretion, direct the order in which such facts are to be presented by the testimony. 3. The refusal of an instruction which is unimpeachable in its application to the evidence is not error, when an

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instruction properly commenting on the evidence has already been given. 4. No harm was done the plaintiff's case by the exclusion from evidence of the company's certificate of incorporation, when the note made payable to it was in evidence for another purpose. 5. The giving of instructions, when not assigned below as a reason for a new trial, cannot be urged for error in the appellate court.

Appeal from St. Louis Circuit Court.

General term reversed; special term affirmed.

E. B. Sherzer, for appellant, cited: Brady *v.* Connelly, 52 Mo. 19, 20; Curtis *v.* Curtis, 54 Mo. 351, 352; Carver *et al. v.* Thornhill, 53 Mo. 283, 285, 286; Musgrave *et al. v.* Ausmus *et al.*, 51 Mo. 561, 568; Saxton *et al. v.* Allen, 49 Mo. 417, 418; Develin *v.* Clark, 31 Mo. 22, 24; Byles on Bills (Sharswood's ed.), 187, 189, note 1; Develin *v.* Clark, 31 Mo. 22, 23; Hamilton *v.* Marks *et al.*, 52 Mo. 78, 80, 81; Parvin *v.* Noyes, 39 Me. 384, 386; Munroe *v.* Cooper, 5 Pick. (Mass.) 412, 413, 414; Hunt *v.* Sandford, 6 Yerg. (Tenn.) 387, 392, 393; Story on Prom. Notes (7th ed.), secs. 186, 196; State *ex rel. v.* Saline County Court, 45 Mo. 242, 249; Henderson *v.* Bondurant, 39 Mo. 369, 373, 374; Smith *v.* Lac County, 11 Wall. 139, 147; Grued *v.* Stevens, 43 Vt. 125, 128, 129; Roberts *v.* Hall, 37 Conn. 205, 1212; Harris *v.* Hays, 53 Mo. 90, 96; Clements *v.* Maloney, 55 Mo. 352, 358, 359; Sears *v.* Wall *et al.*, 49 Mo. 359, 360; Hurp *v.* Salisbury, 55 Mo. 310, 313, 314; Bailey *v.* Smith, 14 Ohio (n. s.), 396; Story on Prom. Notes (7th ed.), sec. 183; Martin *et al. v.* Smylee, 55 Mo. 577, 578; Bauer *v.* Franklin County, 51 Mo. 205, 206.

T. A. Russell, for respondents, cited: Horton *v.* Boyne, 52 Mo. 531; Greer *v.* Yosti, 56 Mo. 307; Bennet *v.* Torlina, 56 Mo. 309; Corby *v.* Butler, 55 Mo. 398; Merrick *v.* Phillips, 58 Mo. 436; Story Eq. Jur., sec. 199 (11th ed.); Holland *v.* Anderson, 38 Mo. 55.

Gantt, P. J., delivered the opinion of the court.

Hickman executed to the National Insurance Company his negotiable promissory note for $203.95, dated December 1, 1867, and payable in two years thereafter. Before

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maturity this note was assigned to plaintiff for $100. The note being unpaid, plaintiff sued. Hickman answered that the note was given as a premium for a policy which the National Insurance Company induced him to take out by fraudulently representing to defendant that the company was solvent and reliable, whereas it was nothing but a cheat, and its business was carried on for the mere purpose of swindling those who insured in it; that when the note was transferred to plaintiff he had full knowledge of the fraudulent nature of the note. By his reply, plaintiff claimed to be an innocent holder for value without notice. There was a trial, and the jury found for the defendant. On appeal to the general term the judgment was reversed, and defendant appealed to this court.

At the special term the only reasons assigned for a new trial were that—

1. The verdict was against law and evidence.

2. Because the court refused plaintiff's instructions.

3. Because the court admitted improper evidence on the part of defendant.

4. Because the court excluded proper evidence on the part of plaintiff.

The instructions refused were the following:

1. The jury are instructed that, in law, a valuable consideration is any moneyed [money] consideration, and, to be valuable, need not be of the marketable value of the note.

2. If the jury believe from the evidence that the plaintiff took the note sued on for a valuable consideration, without any notice of any fraud upon the part of the National Insurance Company, they will find for the plaintiff.

3. If the jury believe from the evidence that the defendant Hickman made and delivered the note in question to the National Insurance Company, and that the National Insurance Company, before the maturity thereof, transferred said note to the plaintiff for a valuable consideration, then

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they will find for the plaintiff, unless they believe that the plaintiff, at the time he took the note, knew that it was procured by fraud.

4. The jury are instructed that the note sued on is, by its terms, negotiable, and although they may find that the National Insurance Company procured it by fraud, yet, if the note came into the hands of the plaintiff, Terry, without any notice of such fraud, and that he paid a valuable consideration therefor, they will find for the plaintiff.

The following were given:

For the defendant: If the jury believe from the evidence that the consideration of the note sued on was the making by the National Insurance Company of a policy of insurance to defendant, and that, prior to the receipt of such policy and the execution of said note by defendant, the officers and agents of said insurance company falsely and fraudulently represented to defendant that said company was a good and solvent company, and that defendant, relying solely upon said false and fraudulent representations, accepted said policy and executed said note, and that said note was afterwards assigned by the company to plaintiff, and plaintiff, at the time of the said assignment, knew, or by the exercise of ordinary prudence might have known, how said note was obtained and the consideration therefor, then, although they may further believe from the evidence that said note was assigned to plaintiff before its maturity and for value, they will find a verdict for defendant.

For the plaintiff: 1. The court instructs the jury that the burden of showing that the plaintiff is not the *bona fide* holder of the note sued upon, on account of fraud in the taking and transfer of the same, is upon the defendant; and that such fraud is not to be presumed, but must be established by competent evidence; and, unless the jury find that Terry knew, or had grounds to believe, at the time of the purchase of the note, that it was obtained by fraud, they will find for the plaintiff, if they find that under the

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evidence and instructions he has proved himself the owner thereof.

2. The jury are instructed that if they believe from the evidence that the plaintiff acquired the note in question for a valuable consideration, then he can maintain this action without any written assignment.

The errors assigned by respondent in respect of the action of the court at special term are:

1. That the court refused to admit the certificate of incorporation of the National Insurance Company.

2. That it erred in admitting evidence of the amount of the capital stock of the National Insurance Company.

3. That it erred in admitting evidence of fraud and want of consideration, before giving evidence of notice of these to plaintiff.

4. In refusing plaintiff's instructions.

5. In giving defendant's instructions.

The evidence that the company was a bubble, from the first, was tolerably full, and the evidence tended to show that, when the note was assigned, its reputation for insolvency and fraud was general. This, however, is denied by the witnesses of plaintiff. The evidence as to the price given for the note was conflicting. It was admitted that the amount of it was $100; but whether it was for money paid, or in compensation for services rendered by plaintiff in his professional capacity, was not clear. He deposed to the first. Mr. Stone, a witness for defendant, deposed that plaintiff had told him, in the spring of 1868, that he received the note in part payment for services as attorney. The difference is important to this extent, that, if he had been the attorney of the company before taking the note, he was more likely to be acquainted with the state of its affairs, and cognizant of the frauds by which it had procured its policies. It may also be important for another reason. It was held by the Supreme Court of Missouri (*Goodman* v. *Simonds*, 19 Mo. 106) that a party to whom negotiable

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paper is transferred merely as security for a preëxisting debt takes it subject to all equities existing between the original parties. This was decided in 1853. In 1847 the same court had given a different ruling. *Clark* v. *Loker*, 11 Mo. 97. The courts of New York and Tennessee had decided the same matter differently from the views entertained by the Supreme Court of the United States (*Swift* v. *Tyson*, 16 Pet. 1), and the case of *Goodman* v. *Simonds* coming afterwards before the Supreme Court of the United States (20 How. 343), that court, after a long and critical examination of the authorities, made a decision, in 1857, which is diametrically opposed to the views entertained by the Supreme Court of Missouri in 1853. But this is not a point on which the Supreme Court of the United States has controlling authority, and this court receives the law as expounded by our own court of last resort.

No instruction was asked on this head, nor was the sufficiency of the consideration directly challenged. It would appear that the argument of the defendant was that the small sum paid for the note was evidence of the suspicion with which the plaintiff regarded it, for it was in proof that he satisfied himself preliminarily of the solvency of the maker. In fact the only evidence on which the defendant relied to support his answer was, first, the fraud practiced on him by the National Insurance Company; second, the presumption arising from the alleged notorious condition of the insurance company when the note was assigned, taken in connection with the inadequate price paid for it, that plaintiff had notice of the infirmity of the company's right to hold defendant. It may be conceded that the tendency of the evidence was to establish these facts, and we must now see whether the plaintiff was injured by any ruling of the court at special term. The errors he specially assigns in argument are:

First, that the court excluded the certificate of incor-

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poration of the National Insurance Company. But this did him no harm, for the note was admitted in evidence for another reason, and the proof of the incorporation of the company was only needed for this purpose.

Second, that the court erred in admitting evidence of the want of capital on the part of the company. We see no error here. It was natural and proper that, in the attempt to prove the original insolvency and worthlessness of the company, evidence should be given that its alleged capital had no existence.

The third error assigned was that the court erred in admitting evidence of fraud and want of consideration, before giving evidence that plaintiff had notice of this fraud and want of consideration.

The order in which such evidence is given must rest very much in the discretion of the court of first instance. We can perceive nothing in the present case calling for any review of that discretion. Indeed, it seems more logical to give evidence of a fact before proceeding to prove that the knowledge of this fact came to another, than to invert the order of the evidence. At any rate, it is not error to follow the order observed by the Circuit Court.

The fifth error assigned is the giving of defendant's instructions. This was not assigned as a reason for a new trial, and cannot be insisted on.

The fourth error assigned is the refusal of plaintiff's instructions. Whether there be error here will depend, not so much on the abstract correctness of a refused instruction, as the need of it to enable the jury to dispose of the case before them. If the instructions given were a correct comment on the evidence, and duly directed the jury as to the law applicable to it, nothing more was needed, and the refusal to lay before the jury abstract or superfluous legal propositions of unimpeachable accuracy cannot be a ground of reversal.

The first instruction refused was not necessary, nor can

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it be said to be unqualifiedly correct. It might be taken to mean that a person giving the smallest sum of money for a note calling for the payment of thousands was in a legal sense a purchaser of it for a valuable consideration. The plaintiff has no reason to complain if a proposition so carelessly worded, and so liable to be misunderstood, is withheld from the jury.

The second instruction embodies a correct principle, but it had been already given in substance in the two declarations of law asked by the plaintiff and given by the court.

The third and fourth instructions refused are liable to the same observations.

It is not our province to comment upon the weight of evidence. The jury, under correction of the court of first instance, has control of that matter. We are of opinion that there was evidence tending to prove the defenses set up by the answer, and that the jury was properly instructed as to the law applicable to that evidence. The judgment of the court in general term is reversed, and the judgment of the court in special term is affirmed. The other judges concur.

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JOHN F. DARBY, Appellant, *v.* FRANCIS CABANNÉ and UNIT RAISIN, Respondents.

February 14, 1876.

1. A demurrer under the 6th subdivision of section 6, Article 5, of the Practice Act is sufficient, if the ground of demurrer is stated in the very language of the act.

2. A man of weak intellect from habitual drunkenness, and incapable of managing his own affairs, may make a contract for necessaries, including such things as are useful and proper for his station. He may make a contract with an attorney to have a guardian appointed for his protection, under the statute; and the attorney can recover a reasonable fee from the estate of the drunkard for the value of services rendered in procuring the appointment of a guardian, and for moneys expended for costs.

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APPEAL from the St. Louis Circuit Court.

Reversed and remanded.

John F. Darby, pro se, cited: 2 Kent's Com. 226, 453; 1 Story on Con. 78; 1 Pars. on Con. 383, 385; 1 Coll. on Lunacy, 375, 385, 403; Chitty on Con. 79, 187; State *v.* Hundley, 46 Mo. 414; State *v.* Baird, 47 Mo. 301; Dutcher *v.* Hill, 29 Mo. 271; Eaton *v.* Perry, 29 Mo. 271.

J. G. Lodge, for respondents, cited: Whittlesey's Pr., sec. 61, p. 208; Wag. Stat., ch. 74, p. 711.

BAKEWELL, J., delivered the opinion of the court.

Defendants demurred to the petition of plaintiff herein, and, for ground of demurrer, alleged that it does not set forth facts sufficient to constitute a cause of action. The demurrer was sustained in the court below, and, plaintiff declining to plead further, final judgment was rendered for defendants on the demurrer. Plaintiff, having duly saved his exceptions, and his motion for a new trial being overruled, brings the case here by appeal.

A demurrer, under the 6th subdivision of Article 5 of the Practice Act, stating the grounds of it in the language of the subdivision, is sufficient, and the ground of the objection need not be more specifically pointed out. To sustain a demurrer under this subdivision, the statement of facts must be such that, admitting them all to be true, the court is authorized to say that they furnish no cause of action, at least against the defendant demurring.

The petition states that defendant Francis Cabanné is over fifty years old; that he has an estate worth $200,000, bringing in a large revenue from rents; that Cabanné had become an habitual drunkard, whereby his mind had become weakened and impaired, so that he was incapable of managing his affairs; that he had taken up his residence at a low drinking-house, and, from mental incapacity, become the dupe of knaves who were cheating him out of his property to the amount of $10,000 annually; that his habits and person had become filthy and intolerably offensive, by

reason of which he had lost his health and was "confined to his wretched bed, bloated, ghastly, and almost unconscious;" that he was fast sinking into the grave from bad whisky, and must have died in two weeks; that, whilst Francis Cabanné was in this condition, his brother called upon plaintiff, as an attorney and an old and intimate personal and professional friend of defendant Francis and his said brother, "to employ and retain plaintiff as attorney for and in behalf of said defendant Francis Cabanné, as the primest and one of the first necessaries of his life and being, to take such steps and legal proceedings as were required by the emergencies of the case, and were right and proper to be furnished defendant under the circumstances, so that he might have his person decently taken care of, his health restored, and have him provided with the common necessaries of life, for the protection of his estate and the preservation of his existence;" that said brother was then acting as the agent of defendant Francis, and making a contract as his agent, and in defendant's name, with plaintiff; and then stated that said Cabanné's estate was ample, and that plaintiff, for his professional services, should be handsomely paid by said Francis Cabanné; that plaintiff, having been thus employed and retained for and on behalf of said Francis Cabanné, commenced proceedings under the statute to have defendant Cabanné declared incapable of managing his affairs; that he was diligently employed for one month in that behalf for defendant, procuring witnesses, preparing the necessary complaint, having it preferred by a proper functionary, and preparing and prosecuting proceedings in the St. Louis Probate Court, and obtaining the appointment of defendant Unit Raisin as guardian of defendant Cabanné, as a person incapable of managing his own affairs; and that, on motion of said plaintiff, for and on behalf of defendant Unit Raisin, said Raisin was appointed guardian and duly qualified. In consequence of which services—which are alleged in the

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petition to have been necessaries for defendant Cabanné—said Cabanné was properly taken care of, removed to an asylum, his health restored, and his comforts attended to. Plaintiff further says that, in and about the necessary costs of said proceedings in the Probate Court, he paid out and expended $50 for jury fees, witness fees, and fees for service of notices, which it was necessary to advance to the officer. Plaintiff says his services were reasonably worth $1,000, and asks judgment for that amount.

The petition nowhere alleges that Francis Cabanné is, or was at the time of the alleged contract, or at any time, an idiot, or lunatic, or person of unsound mind, but merely that he was so addicted to habitual drunkenness as to be incapable of managing his own affairs. Our law provides for appointing a guardian for such persons, though they be not of unsound mind, or idiots, or lunatics. Wag. Stat. 178, sec. 52. Defendant appears from the petition to have been of a very weak mind from drunkenness. It may be that defendant Cabanné had not the degree of intellect sufficient to enable him to contract. But that is nowhere said in the petition, and, for anything appearing on the face of the pleading, he may have had, in his sober moments, sufficient intellect to make a bargain. It is alleged that a bargain was made with plaintiff, by defendant's agent, to employ plaintiff to render professional services which are declared to have been necessary. These services may have been, and are clearly alleged in the petition to have been, absolutely necessary. It may be that great skill and diligence were required to protect defendant against himself; and we cannot say that, in his sober moments, he could not authorize his brother to make a valid contract with an attorney to take steps, under the statute, to have a guardian appointed to take him out of the clutches of the harpies who are alleged to have been taking advantage of his weakness and wasting his estate, nor from how slight circumstances such authority to the brother might be implied.

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Even the contract of an insane man cannot be avoided if made in good faith on the part of the other side, and for the procurement of necessaries, which would include, not merely absolute necessaries, as in the case of an infant, but such things as are useful for him and proper for his means and station.

The petition is loosely and rhetorically drawn, but we cannot say that it does not sufficiently set out a contract with plaintiff by defendant Cabanné, through his agent, which the courts would uphold, and that, admitting all the facts stated to be true, plaintiff has no cause of action against either defendant.

We, therefore, think that the judgment of the Circuit Court, sustaining the demurrer filed to plaintiff's petition, should be set aside. The judgment of the Circuit Court is reversed and the cause remanded. Judge Lewis concurs; Judge Gantt, having been of counsel, did not sit.

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J. N. Shelton *et al.*, Plaintiffs in Error, *v.* Rodney Wyman *et al.*, Defendants in Error.

February 14, 1876.

A letter or account of sales, sent by a commission merchant to his customer, showing a balance of money on hand subject to the customer's order, is a "writing for the payment of money," within the meaning of the statute of limitations, and action thereon is not barred within ten years.

Error to St. Louis Circuit Court.

General term reversed; special term affirmed.

Bereman & Smith, for plaintiffs in error, cited: Wag. Stat. 917, 918, secs. 9, 10; Reyburn *v.* Casey, 29 Mo. 129; Moorman *v.* Sharp, 35 Mo. 283.

Irwin Z. Smith, for defendants in error, cited: Carr's Admr. *v.* Hurlbut's Admr., 41 Mo. 264; Chambers *v.* Ruby, 47 Mo. 99; Wag. Stat. 917, 918, secs. 9, 10.

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LEWIS, J., delivered the opinion of the court.

The petition states that three several shipments of wheat were made by plaintiffs to defendants, to be sold on commission. Each shipment was made the subject of a separate count, in which, after reciting the sale and receipts of the proceeds by defendants, plaintiffs further declared that the defendants "then and there agreed to pay the same to plaintiffs; that said facts and said promise are in writing, signed by the said defendants, and hereto annexed, marked exhibit, etc." The exhibit referred to in the first count was a letter from defendants to plaintiffs, as follows:

"*St. Louis, September 14, 1867.*

"*Messrs. J. N. Shelton & Co., White Cloud, Iowa.*

"GENTLEMEN: We have received, per steamboat 'Ben Johnson,' 142 sacks wheat, which we sold to-day at $1.75 per bushel; account sales will follow in due course. The market was a little dull and heavy to-day, but we think prices will be sustained; the receipts continue light, and our millers have no supply bought ahead. We will send you more sacks by the 'Isabella,' which leaves on Tuesday next; will also send some to Stone and Cole, at Millville Landing. Referring to the inclosed R. C., we remain,

"Yours, truly,

"RODNEY WYMAN & Co."

The two other exhibits were "accounts sales" in the usual mercantile form; the first closing with the entry: "Net proceeds at Cr. J. N. S. & Co., $315.99;" and the second with a like entry, stating the sum at $325.28. Each was signed by defendants.

The answer set up the statute of limitations, averring that the suit was not commenced within five years after the right of action accrued. To this plaintiff replied that the suit was founded upon instruments of writing for the payment of money, and no bar could arise, therefore, until after the lapse of ten years. Upon trial before the court, sitting as a jury, the defendants asked for a declaration of

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law to the effect that the action was barred by the statute of limitations. This was refused, and judgment was rendered for the plaintiffs. On appeal to the general term this judgment was reversed, and the plaintiffs now bring their case here by writ of error.

The statute prescribes a limitation of ten years for "an action upon any writing, whether sealed or unsealed, for the payment of money or property." Wag. Stat. 917, sec. 9. The present action was instituted more than five, but less than ten, years after the right accrued. So that, if the exhibits filed are within the descriptive statutory words above quoted, the plaintiffs ought to prevail.

If a rule of interpretation were now first to be established for the question thus presented, I should strongly incline to a distinction between such writings as are delivered for the express purpose of declaring an obligation to pay money, and of furnishing to the obligee a tangible memorial of such liability, on the one hand, and, on the other, such mere missives or communications as are designed only to keep the recipient posted concerning the state of accounts between the parties, and the credits to which he will be entitled in a future settlement. Within the first class would be placed promissory notes, bills of exchange, bonds, due-bills, etc. A petition upon one of these would need to state nothing more than the execution and delivery of the instrument. Within the second class would fall the exhibits sued upon in the present case. As to these it might be sufficient in some instances to declare upon the writing alone. But in this case, at least, the pleader deemed it important to set out in detail the facts of shipment, sale, and receipt of proceeds, as creating grounds of liability in the defendants which would sustain an action without the aid of the papers filed. The letter and accounts would thus seem to serve rather as testimony in support of the claim than as the foundation of the action itself. Such a distinction applied to the present

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case would sustain the views of the general term, and declare this action barred by the limitation of five years.

But we must yield to the weight of authority. In *Reyburn* v. *Casey*, 29 Mo. 129, Judge Ewing said: "The broad and comprehensive language of the statute evidently embraces all kinds of written instruments, without regard to their mere form or phraseology, which imply a promise or agreement to pay money, and is not restricted to such as have the requisites of promissory notes, or to such instruments as contain an express promise or agreement upon their face to pay. It is sufficient if the words import a promise or agreement, or that this can be inferred from the terms employed." The case of *Harrow* v. *Dugan*, 6 Dana, 341, is approvingly referred to in the same opinion. There the defendant acknowledged that he had "borrowed" a sum of money from the plaintiff. The instrument was held to be a note for the direct payment of money. It seems impossible to distinguish between a writing which acknowledges that the defendant has borrowed money from the plaintiff and one which admits that he has sold the plaintiff's property and holds the proceeds. The agreement to pay the sum mentioned is inferable as much in the one case as in the other. In *Moorman* v. *Sharp*, 35 Mo. 283, the opinion in *Reyburn* v. *Casey* is reaffirmed. These decisions are sufficiently comprehensive, in our view, to control the present case, and leave us no alternative but to reverse the judgment of the general term and affirm that of the special term. The other judges concur.

E. W. PATTISON, Appellant, *v.* GEORGE A. LUTZ, Respondent.

February 14, 1876.

In a suit before a justice of the peace, not founded on account, nor on the instrument of writing filed with the justice, a statement of facts consti-

tuting the cause of action such as will inform defendant of the nature of the claim, and specific enough to bar another action for the same cause, must be filed with the justice before summons is issued.

APPEAL from St. Louis Circuit Court.

General term affirmed and cause remanded.

E. W. Pattison, for appellant, cited: 2 Wag. Stat. 1059, sec. 6; Berrucker *v.* Miller, 37 Mo. 498; Robinson *v.* Walker, 45 Mo. 117; Sevainson *v.* Bishop, 52 Mo. 227; Forbes *v.* Shellabarger, 50 Mo. 558; Smith *v.* Monks, 55 Mo. 106.

Gottschalk, for respondent, cited: Wag. Stat. 270, sec. 8, p. 814, sec. 13; Stone *v.* Corbett, 20 Mo. 353; Whisler *v.* Bragg, 31 Mo. 124; Rev. Stat. 1855, p. 931, sec. 13; Harris *v.* Hanon, 3 Mo. 450; Bacocke *v.* Blount, 6 Mo. 338; Clemens *v.* Collins, 11 Mo. 320; Mullin *v.* Pryor, 12 Mo. 307; Collins *v.* Warburton, 3 Mo. 203; Baker *v.* Blades, 23 Mo. 405; Garesché *v.* Chouteau, 37 Mo. 413.

BAKEWELL, J., delivered the opinion of the court.

This cause was originally tried before a justice of the peace, where judgment was given for plaintiff. On appeal to the Circuit Court the case was tried anew and judgment rendered for plaintiff at special term, but, on appeal to general term, the judgment of special term was reversed, and plaintiff appeals to this court from the judgment of the Circuit Court at general term, reversing and remanding the cause.

The following paper was filed in the justice's court; nothing else was filed prior to the issue of summons in the cause:

"*St. Louis, June 30, 1871.*

"MR. BROWN: Please pay to Mr. Samuel St. Clair the $160 on that account what you owe me.

"GEORGE A. LUTZ."

The paper was indorsed:

"Pay to Wilson Bros. & Co. on account of Samuel St. Clair."

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"Pay E. W. Pattison, for collection, on account. Wilson Brothers."

It appears from the evidence that Lutz ordered a carload of staves from Brown, and either paid him $160 on account, leaving a balance of $57 due after the receipt of the staves, or took the staves in satisfaction of a debt of $160 due from Brown and Lutz. St. Clair subsequently claimed that the staves were his, whereupon Lutz paid St. Clair the balance of $57, and gave him the paper set forth above, for the purpose, as St. Clair said, of enabling St. Clair to settle with Brown. On taking the paper, St. Clair told Lutz that, if Brown did not pay him, he should come back upon Lutz. Brown is insolvent and a non-resident, and refused to pay. There was also evidence tending to show that Brown owed Lutz $160, and sent the staves to pay the debt. A motion to dismiss the suit because there was no cause of action, or statement, filed, was overruled.

This suit is not founded on an account, nor on the instrument of writing filed with the justice. The statute is imperative that, under such circumstances, a statement of facts constituting the cause of action shall be filed with the justice before any process shall be issued. The statement need not be formal, and is sufficient if it advise the other party of the nature of the claim, and is sufficiently specific to be a bar to another action. But some statement must be filed, and, unless we regard the paper sued on as the foundation of this suit, nothing whatever was filed to show defendant for what he was sued. The paper sued on was no cause of action, unless we regard it as a bill of exchange, which it was not; and, if it be regarded as a bill of exchange, no steps had been taken to hold Lutz, the drawer and defendant, and he was not liable upon it.

The judgment of general term, reversing the judgment of special term, is affirmed and the cause remanded. The other judges concur.

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Charles W. Guthrie, Respondent, *v.* Christopher C. Weaver, Appellant.

February 14, 1876.

1. Replevin will not lie for a coffin and its contents, when those contents are a corpse.
2. When a coffin, with the consent of all persons having any pecuniary interest in it, has been deposited in the earth for the purpose of interment, with a corpse inclosed within it, it is no longer an article of merchandise.
3. There is no property in a corpse; the relatives have in regard to it, the right of interment; and this right having been once exercised by the father, though against the husband's consent, or by the husband, though against the consent of the father, no right to the corpse remains, except to protect it from insult.

Appeal from St. Louis Circuit Court.

Judgment reversed, and judgment in favor of defendant for 1 cent damages and costs.

J. Niel, for appellant, cited: 4 Bradford's Surr., appendix, 503; Gen. Stat. (1865) 663, sec. 1.

E. W. Pattison, for respondent.

Bakewell, J., delivered the opinion of the court.

This is an action in the nature of an action of replevin, brought under our statute for the claim and delivery of personal property, by the respondent, for a certain metallic casket or coffin, of the value of $90, with its contents, which, it is alleged, were wrongfully taken and detained by the defendant. The affidavit attached to the petition alleges that plaintiff is the owner of the casket, and entitled to its possession; that it was wrongfully taken, and is wrongfully detained, by defendant; that plaintiff's cause of action accrued within one year; and that plaintiff will be in danger of losing his property unless it be taken out of defendant's possession.

A bond was given and the order of delivery granted, and the casket and contents were taken by the sheriff from defendant's lot in Bellefontaine cemetery, where they were interred, and delivered to plaintiff.

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The contents of the casket were *the dead body of plaintiff's wife*, the daughter of defendant.

Under the statute (Prac. Act, Art. 6, sec. 6, Wag. Stat. 1025), if plaintiff states in his affidavit that the property taken was wrongfully taken, and his right of action accrued within one year, defendant shall not be allowed to retain possession, which otherwise he might do on giving a counter-bond.

The answer denies all the material allegations of the petition, and states that Maggie J. Guthrie, wife of plaintiff and daughter of defendant, died on January 25, 1873, at the residence of her father, the defendant, in St. Louis; that defendant owned then, and now owns and possesses, a lot in Bellefontaine cemetery, wherein are interred the mother of deceased and her sister; that the deceased, Maggie, on her death-bed, requested to be buried in said lot, and that plaintiff assented to her request, and that she was so buried with his assent; that deceased was inclosed, by defendant, after her death, in the metallic casket sued for herein, and buried as before stated; and that the casket and body have, in obedience to the process herein, been disinterred by the sheriff, and delivered to plaintiff. Defendant prays that the casket and body be returned to him at the place from whence they were taken, and for damages and costs.

The replication denies that Maggie, the deceased, requested to be buried in defendant's lot, and denies any assent on the part of plaintiff to any such request.

From the evidence in the case it appears that plaintiff and defendant were copartners in a hardware store, under the style of Guthrie & Company; that plaintiff was secretly married to deceased in 1871, and that, some months afterwards, they were openly married, with the consent of defendant; that on her death-bed she desired, in the presence of her husband, to be buried in her father's lot. There is evidence tending to show that she requested a grave to be kept there for husband and child by her side, and that this

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was not done. It appears that she died at her father's house, where her husband was not living, though he was present at her death. The casket in which she was buried was selected by her husband and father conjointly. The funeral expenses were paid, as to a small part of them, by goods from the store of Guthrie & Co.; as for the greater part of the expenses, however, it was met by a note of Guthrie & Co., given by plaintiff, which was taken up by the individual note of defendant, which last note was paid before maturity, without the knowledge and consent of defendant, by the plaintiff. The undertaker swears that he charged the whole funeral expenses to defendant, and looked to him for pay, he being the person considered most responsible in a pecuniary point of view. Plaintiff intimated, before the funeral, an intention to remove the body to a lot of his own, when he procured one, and has since interred her in a lot jointly owned by his mother and his brother-in-law. After the funeral the plaintiff and defendant quarreled violently, and plaintiff, in the presence of three young men, shortly before the commencement of this suit, made to the father of deceased certain horrible charges against the deceased and one of her brothers. It further appears that, before the commencement of this action, plaintiff demanded of defendant possession of the casket and the body of deceased, to reinter them, which was refused. To so much of this testimony as did not touch the question of the value and ownership of the casket plaintiff objected, and excepted duly to its introduction.

The plaintiff asked an instruction to the effect that, if the casket was the property of plaintiff, and withheld from him by defendant, he should recover; also that, if plaintiff bought and paid for the casket, and demanded of defendant to permit the same to be taken up and buried in another lot, he is entitled to recover, even though deceased requested to be buried in defendant's lot. These instructions were refused, and plaintiff excepted.

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Defendant asked the court to declare that the pleadings admit that defendant was, prior to his daughter's death, owner of a lot in Bellefontaine cemetery, in which members of his family were interred, and that she was buried there on January 25, 1873, in presence of plaintiff; also that, if there was a valid contract between defendant and plaintiff as to the terms on which deceased was buried in defendant's lot, and a breach by defendant, this form of action is not the remedy; also that, if defendant owned the casket at the date of interment, and the same was with his assent deposited in the grave, with the body of deceased therein, this was a waiver of his right of property therein; also that, if the jury find for defendant, they will find the value of the property claimed, and damages from the time of taking till the date of verdict, and a return of the property to defendant; also that, if deceased on her death-bed requested her father, in her husband's presence and with his assent, to bury her in her father's lot beside her sisters, they will find for defendant, even if plaintiff owned the coffin; also that, if plaintiff owned the coffin, yet if he surrendered it for the burial of his wife, and dedicated it to that use, he cannot recover. The instructions are lengthy; the exact language is not here presented, but their full and exact meaning is given. These instructions were all refused, and defendant excepted.

The court gave the following instructions, of its own motion:

"If the jury find for the plaintiff, they will assess the damages at the sum of one cent. If they find for the defendant, they will assess the value of the property, and damages for the taking and detention of the same by plaintiff. The measure of damages, in case of finding for the defendant, will be interest on the assessed value of the property at 6 per cent. per annum, from the time when such property was taken from the defendant to the time of

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trial." To the giving of this instruction the defendant excepted.

The court gave the following instruction, at the instance of plaintiff:

"If the jury believe that the deceased wife of plaintiff, before her decease, requested to be buried in the lot of the defendant, and that plaintiff acceded to that request, yet if they believe that such assent was given upon conditions which have not been complied with or waived by plaintiff, they will find for plaintiff, if they further find that plaintiff bought and paid for the casket." To the giving of this instruction defendant excepted.

At the instance of defendant the court gave the following instruction, and plaintiff excepted:

"If the jury believe from the evidence that the deceased was the wife of the plaintiff, and, in anticipation of her death, made a request of her father, the defendant, that on her death he would place her remains in the same lot or place of interment with her deceased sister, and that the plaintiff knew of such request or was informed of such request before the burial of his wife, or was present at the funeral service at the grave and place of interment of his deceased wife and did not dissent from such place of interment, then the plaintiff is not entitled to recover in this action."

There was a verdict and judgment for plaintiff. The defendant in due time filed a motion for a new trial, which being overruled, the case is brought here by appeal.

It is manifest from what has been said that, in spite of the allegations of the pleadings, this is no dispute for the possession of a burial casket, but a contest for the possession of the mortal remains of the poor lady who lay, when the suit was commenced, in the grave-yard at Bellefontaine. It is shocking to humanity that such a contest should have been carried on in such a manner and through such agencies.

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When a human body has been interred with the knowledge and consent of those who, up to that moment, may have owned the coffin and shroud, these articles are irrevocably consigned to earth, and all property in the purchasers of them is at an end. They become mere adjuncts to the more worthy object, the human body which they serve to inclose whilst it is resolved into the dust from whence it springs; with the coffined clay that they surround, "they have said to corruption, thou art my father, and to the worm, thou art my sister and my mother." They are no longer property, and their relations with the living are at an end. There can be no property in a corpse, and there is none in the shroud which surrounds it, when that corpse has been once committed to the tomb. Of the truth of these propositions we entertain no doubt.

But waiving that, with what propriety can it be said in this case that the casket sued for, *and its contents*, were, at the commencement of the suit, in the possession of defendant, or are now in the possession of plaintiff? It nowhere appears that the defendant owned the fee, or was seized and possessed of the ground in which deceased was interred. That ground probably belonged to the Bellefontaine Cemetery corporation; the defendant evidently had a mere user in the lot for certain purposes, and the casket was in the possession of the corporation; the writ should, therefore, have been properly addressed to them, if it could have issued at all.

The sheriff, in our opinion, might properly have refused to obey such a writ, and should have done so. It is none of his business to disinter the dead and to deliver a decomposing corpse, under pretext of getting possession of a metallic casket.

As far as the substantial rights of these parties are concerned—the real matter in dispute between them—though it is not properly before us, we may say that, in our opinion, whatever right the husband had to bury his wife terminated

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with the burial, and after interment with his consent, or even without it, in the burial lot of her father and family, he had no right to the body at all. This has been decided in Pennsylvania (*Wynkoop* v. *Wynkoop*, 42 Penn. 293), and with the conclusion arrived at by the court in that case we agree. But, whatever rights the plaintiff may have had, it would be indecent and inhuman to hold that they can be asserted in any such proceeding as this. The action of the court in replevin, under our statute, is summary. On giving the proper bond, and filing the necessary affidavit, the writ goes of course, without any examination into the merits, and if, as in this case, the plaintiff chooses to swear that the property was wrongfully taken, and the cause of action accrued within one year, the defendant cannot retain possession until the day of trial, even though he give a counter-bond. Such an affidavit was made in this case, and was a necessity to obtain the object in view—the possession of this poor corpse; and it was made, as the evidence shows, in the teeth of the facts; for it is conceded on all hands that defendant did not unlawfully take the coffin, but that, with the full assent of plaintiff, he caused his daughter's body to be placed in it, and deposited it in his own tomb. The casket never was for an instant, in any sense, in the possession of plaintiff till after the suit was commenced, nor was it ever unlawfully taken possession of by defendant, nor taken into his actual possession at all. If proceedings of this sort are to meet with judicial sanction, and replevin can be maintained virtually for a corpse, the most sacred feelings are in constant danger of intolerable outrage at the hands of any inhuman wretch who has the audacity to make the attempt. The sanctities of the tomb are hopelessly at the mercy of any one who will swear that he is entitled to the possession of a shroud, and the grave must be opened first, and the question of property determined after the sacrilege is complete. No civilized community would endure such a rule of law as this.

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If, then, the plaintiff has any rights in this matter which have been violated, he has his remedy, and those rights can be asserted and maintained; but clearly his remedy is not the one that he pursues in this proceeding, and replevin cannot be maintained for a corpse under the pretext of recovering a coffin.

So far we have no difficulty; but the question presents itself as to the proper judgment to be rendered under the peculiar circumstances of this case. The suit was already executed when the case was reached for trial in the Circuit Court. This poor lady, buried on January 28, 1873, was disinterred on May 19, 1873, and has been reburied in the lot of her husband's mother ever since. If judgment for the defendant be given here, or the cause be reversed and remanded, to be proceeded with below in accordance with this opinion, as defendant in his answer claims the property and demands a return of it, if plaintiff has possession of the property sued for, judgment would be against plaintiff and his sureties that he return the property or pay the assessed value, at the election of defendant, and also damages for the taking and detention, with costs; and the body being now buried—though wrongfully—with the relations of the husband, according to his directions, neither the body nor the coffin can, in our opinion, be lawfully removed against his will. There is no property in a corpse; the relations have, in regard to it, only the right of interment, and this right having been once exercised by the father, though against the husband's consent, or by the husband, though against the father's consent, no right to the corpse remains except the right to protect it from insult. As it is admitted, however, that the coffin and the body are now interred in the lot of the mother and brother-in-law of plaintiff; as they are not only in the grave, but in a grave lot which he does not own even in that limited sense in which a burying lot in a public cemetery is ordinarily owned, they are confessedly not in the possession of the

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plaintiff to return. There is no evidence whatever as to the value of the coffin after it had been used for burying the dead, and, in our opinion, there was no property in it, either in plaintiff or defendant, nor is there any property in it at all in the sense that it could be made an article of merchandise. It has, therefore, no value in money. We think, therefore, that judgment should go in favor of defendant for 1 cent damages and costs.

The judgment of the Circuit Court is accordingly reversed, and judgment entered in this court in favor of defendant for 1 cent damages and costs. The other judges concur.

CHARLES CRAMER, Appellant, *v.* WILLIAM STETHEM, Respondent.

February 14, 1876.

A and B, owning adjoining farms, procured a surveyor to ascertain and mark out the true line between them. It was thus found that A had been occupying eleven acres belonging to B; but it was agreed that the fencing should not be moved until after the harvesting of the crops, A paying rent to B for part of the eleven acres, and B taking immediate possession of the residue. A moved part of the division fence to the new line, and soon afterwards sold his farm to plaintiff, delivering possession. B moved the remainder of the division fence to the new line, whereupon plaintiff sued him for forcible entry and detainer. *Held*, that the plaintiff could not recover. 1. The limit of A's possession, as owner, being established at the agreed line, his vendee could not, by mere volition, extend it to the old line of occupancy, so as to make B a trespasser. 2. It was error to instruct the jury that the defendant's possession required the plaintiff's assent for its lawful continuance.

APPEAL from St. Louis Circuit Court.

General term affirmed; special term reversed and cause remanded.

Kehr, Tittman & Tittman, for appellant, cited: Henschen *v.* O'Bannon, 56 Mo. 289; Porter *v.* Harrison, 52 Mo. 524; Budd *v.* Hoffheimer, 52 Mo. 297; Marshall *v.* Thames

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Fire Ins. Co., 43 Mo. 586; Prewitt *v.* Burnett, 46 Mo. 372; Bartlett *v.* Draper, 23 Mo. 407; King *v.* St. Louis Gaslight Co., 34 Mo. 34; Kincaid *v.* Logue, 7 Mo. 166.

G. M. Stewart, for respondent, cited: Kincaid *v.* Logue, 7 Mo. 166; Ruckwook *v.* Thorp, 8 Mo. 636; McCarty *v.* Alderson, 45 Mo. 35.

LEWIS, J., delivered the opinion of the court.

This is a case of forcible entry and detainer. Plaintiff obtained judgment before the justice, and was again successful before a jury in the Circuit Court, upon defendant's appeal. The last judgment was reversed in general term.

The testimony tended to prove that, for some years prior to 1870, the defendant and one Anderson owned and occupied adjoining farms, supposed to contain eighty acres each. The dividing line ran east and west, Anderson's farm lying on the north. In April or May, 1870, some doubt having arisen about the correctness of their recognized boundaries, the parties procured one Dorer to make a survey and establish the true dividing line. The survey showed that defendant had within his inclosure only sixty-nine acres. The true line was then distinctly marked by stakes, sufficiently far north of the old division fence to add a strip of eleven acres to the defendant's occupancy. The new line was acquiesced in by both parties; but it was agreed that the fence should not be moved until after the harvesting of the crops. Anderson had planted some corn on the west end of the eleven-acre strip, and it was agreed that he should pay to defendant the customary rent therefor, being one-third of the crop. Defendant, with Anderson's consent, entered at once into possession of the remainder of the strip. He cut the meadow grass and established his hay-ricks up to the Dorer line, gathered the fruit from, and located his sorghum mill upon, the eleven-acre strip. The only objection raised by Anderson was to the cutting of some grass north of the Dorer line. In the fall of 1870 Anderson moved part of the division fence, at the west end,

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to a position north of the Dorer line, leaving space for half of a roadway which had been agreed upon to run between the two farms. Soon afterwards he sold his farm to the plaintiff, and delivered possession. In March, 1871, defendant moved the division fence to the Dorer line. This removal constituted the subject-matter of the present suit.

The court, upon its own motion, gave to the jury the two following instructions, viz.:

1. "The court instructs the jury that it is not material whether the survey made by Dorer was correct or not, nor is it important in whom was the title to the eleven acres in dispute. And, although Benjamin F. Anderson, the plaintiff's grantor, did not obtain, or even if he did not expect to obtain, from his neighbors on the north of his farm, possession of a like amount of land as that which said survey gave to the defendant, yet if said Anderson agreed to said survey, and if he consented to and permitted the defendant to cut the grass on one part of the eleven acres in dispute, and to gather fruit from the trees on another part of the same, and himself paid defendant rent for corn grown on another part thereof, and permitted defendant to place and use his sorghum mill thereon, then the defendant was in possession of the said eleven acres in controversy; and if such possession continued—that is, if the same was unchanged by any act or by any conduct of the plaintiff, up to the time of the removal of the fence by defendant complained of—then the defendant is not guilty, and the verdict of the jury must be for the defendant."

2. "If the jury believe from the evidence that plaintiff purchased the farm of said Anderson, and if, at the time he so purchased the same and took possession thereof, the eleven acres in dispute was within the fence or inclosure of said farm, and if, in October or November, 1870, plaintiff moved onto and took possession of said farm, and if he did so claiming possession of all the land within the fence or inclosure thereof, including the land in contro-

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versy, and so continued to claim up to the time of the removal of the fence by defendant complained of, then he was in possession of the land in dispute, and the verdict of the jury must be for the plaintiff, provided the jury also find from the evidence that the defendant did remove the fence and take forcible possession of the land in dispute as alleged."

Comparing these instructions, it would seem that by the second the court intended to inform the jury what "acts or conduct of the plaintiff" would so change the possession of defendant, under the hypothesis of the first instruction, as to deprive him of the conclusion in his favor which that instruction suggests. If the second states the law correctly, there is no want of harmony between the two.

If the defendant was in peaceable possession of the eleven-acre strip when he moved the fence to its northern boundary line, the plaintiff had no cause of action. Such possession, if it existed, was a fact—physical, practical, and visible. The limit of Anderson's possession in that case, at the same time, was a similar fact. To say that such facts could be annihilated by mere volition of the man who stepped into Anderson's place would be to insult the common understanding. Yet it seems difficult to avoid such a deduction from the theory adopted by the Circuit Court. There appears to have been a misapplication of the doctrine by which an owner's occupancy of part of a tract of land, under claim of title to the whole, is treated as a possession of the whole. This is available to protect an owner against trespassers, or to sustain a claim of adverse possession under the statute of limitations. But it has never been held to defeat an older and actual possession in another part of the land claimed. Defendant's possession of the eleven-acre strip was an existing fact when the plaintiff entered and asserted his claim. The latter could no more, by that assertion, extend his possession over the strip than

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he could over the defendant's whole farm. Anderson's possession stopped at the Dorer line. He could deliver to the plaintiff no greater occupancy than he held himself, and the plaintiff could acquire no more by his substitution to Anderson's rights. It will not be pretended that Anderson, if he had never sold to plaintiff, could have maintained forcible entry and detainer against defendant for the removal of the fence. By what process does the plaintiff, upon his own mere assertion, become invested with rights superior to those of his grantor?

Fences and inclosures usually mark the boundaries of possession, but they have no exclusive capacity to such effect. A man having an inclosed field may sell part of it to his adjoining neighbor, and deliver possession, so as to include bodily the former division fence. From that moment he can assert no possessory rights whatever as to the fence, but must defer to his neighbor in all beyond the new dividing line. Thus the defendant, by the Dorer survey and his agreement with Anderson, followed by the transfer of actual possession and his own uninterrupted acts of ownership, acquired all the possessory rights, regardless of the location of the fence, which otherwise would have been retained by Anderson and his grantee, and which might then have been enforced in this proceeding.

The second instruction, therefore, and the qualifying condition in the first, so far as it refers to the facts supposed in the second, were erroneous.

A third instruction given was as follows:

"If the jury believe from the evidence that defendant acquired and held possession of the ground in dispute before the sale of the farm by Anderson to plaintiff, and if they also believe that, after the purchase of the farm by plaintiff, he assented to such possession by the defendant, then there was no change of defendant's possession, although the ground was within plaintiff's fence or inclosure."

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This also was erroneous, since it implied a necessity for plaintiff's assent to a fact already accomplished, and independent of his assent for its continuance or otherwise.

The action of the court upon the defendant's instructions need not be discussed here, since the principles already announced sufficiently indicate which of them ought to have been given, and which refused.

The judgment of the general term is affirmed, and that of the special term is reversed, and the cause remanded. The other judges concur.

JOHN F. DOERBAUM, Appellant, *v.* FRANCIS FISCHER, Respondent.

February 14, 1876.

Plaintiff built a house, on his own lot, in such a manner as to cause the formation of a pond on defendant's lot adjoining, from which the water soaked through and injured plaintiff's building. *Held*, that plaintiff had no right of action.

APPEAL from St. Louis Circuit Court.

Affirmed.

Eber Peacock, for appellant, cited: Session Acts, 1870, 454; Rev. Ord. (St. Louis) Art. 9, p. 103; Morgan *v.* Cox, 22 Mo. 375; Rust *v.* Low, 6 Mass. 94; 8 Johns. 421; 19 Johns. 384; 6 Modern, 314; Clemans *v.* Rankin, 22 Mo. 573; Hannibal *v.* Hannibal & St. Jo. R. R. Co., 49 Mo. 480.

Farish & Griffin, for respondent, cited: Laumier *v.* Francis, 23 Mo. 184.

GANTT, P. J., delivered the opinion of the court.

Doerbaum and Fischer were proprietors of adjoining lots. The ground of both sloped from west to east, and before the erection by Doerbaum, whose lot was the easternmost, of a building, and the filling up of a part of his land, the

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water falling in rain ran over plaintiff's lot and found a way eastward. Doerbaum having built on his lot, and partially filled it up, the water thereafter falling collected on Fischer's lot, percolated through the soil, and found its way into Doerbaum's cellar, damaging his house seriously. Evidence to this effect was offered; and, in addition, the plaintiff offered to show, by a copy of the proceedings of the Board of Health, that this body, in April, 1874, resolved that "a pond or pool of water, situated in block —, bounded north by Cozzens street, west by Summit avenue, south by Chouteau avenue, and east by Josephine street, reported to this board as a nuisance by the health officer, be, and the same is hereby, condemned as a public nuisance, and ordered to be abated as an urgent sanitary measure." The defendant objected to, and the court excluded, this evidence; exception was saved to this exclusion. This was all the evidence in the cause.

Defendant asked, and the court gave, an instruction that plaintiff had shown no right to recover. Plaintiff excepted, became nonsuit, and appealed to this court.

1. The petition in this case is peculiar. It states that plaintiff owned and occupied a lot on Chouteau avenue, and that defendant owned and controlled the lot adjoining it on the west, and allowed and permitted a large body of water to accumulate thereon, which became, and was, a nuisance; that this water had no outlet, and, being permitted to accumulate as aforesaid and to remain thereon, it was backed up against plaintiff's building, and, percolating through the soil, ran into plaintiff's cellar and injured his property. No negligence or willful wrong is imputed to defendant.

Defendant filed an answer denying every allegation of the petition; and the evidence, as far as it was admitted, showed that the old way by which the water escaped had been closed by plaintiff building and filling up on his lot. We think that the petition scarcely showed a right to recover

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damages, but we are clear that the evidence disproves any such right. If the plaintiff, by erecting a house on his own lot, dammed up the water on defendant's lot, he cannot recover damages therefrom resulting, in the absence of any statute, State or municipal, defining the duties of adjoining proprietors. *Laumier* v. *Francis*, 23 Mo. 181; p. 184 for the remark quoted. One would be apt to think that a grave decision was scarcely needed to establish a conclusion so consonant with common sense, but, as the matter has been judicially decided by our own court of last resort, it is not amiss to refer to that decision.

2. We are not told for what purpose the plaintiff sought to give evidence of the proceedings of the Board of Health, and we are unable to see that they were relevant or competent for any purpose.

The judgment of the Circuit Court is affirmed. Judge BAKEWELL, having been of counsel, not sitting.

EZEKIEL M. BARTLETT, Respondent, *v.* ABRAM S. MATSON, Appellant.

February 14, 1876.

1. In cases not within the statute of frauds the consideration need not be expressed in a written contract, and, if not expressed, may be shown *aliunde*.

2. Where A shipped goods to B, upon the trust that he would sell them and apply the proceeds to the payment of notes of A, on which C was liable as accommodation acceptor, and B wrote to C, stating that he would apply the funds as agreed between himself and A, *held*, that, if B deposited the funds in bank to the credit of A, and the bank neglected to apply them to the payment of the bills of A, on which C was liable as indorser, no cause of action accrued to C, B having deposited the funds according to the directions received from A.

APPEAL from St. Louis Circuit Court.
Reversed and remanded.

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F. F. Espenchied, for appellant, cited: Chitty on Con. (7th Am. ed.) 15, 18, 53, 54; 22 Am. Jur. 16, 20; 1 Pars. on Con. 389, note *m*; Exchange Bank *v.* Cookman, 1 W. Va. 69, 77.

Fagg, Dyer & Emmons, for respondent, cited: Wag. Stat. 270, sec. 34; Arms *v.* Ashley, 4 Pick. (Mass.) 71; Thompson *v.* Blanchard, 3 N. Y. 337; Davenport *v.* Mason, 15 Mass.; Patchin *v.* Swift, 21 Vt. 297; Cummings *v.* Dennett, 26 Me. 399; Beven *v.* Burbanks, 16 Me. 160; Block *v.* Elliott, 1 Mo. 277; Halsa *v.* Halsa, 8 Mo. 307; 2 Kent. 465; 1 Pars. on Notes, 175, sec. 1; Marks *v.* Bank of Missouri, 8 Mo. 319; Wilson *v.* Sergeant, 12 Ala. 770; Lawrence *v.* Fox, 20 N. Y. 268; Rogers *et al. v.* Gosnell, 58 Mo. 591. Myers *v.* Lowell, 44 Mo. 328; Rogers *v.* Gosnell, 51 Mo. 466; Berly *v.* Taylor, 5 Hill, 576.

BAKEWELL, J., delivered the opinion of the court.

It appears from the record in this case that plaintiff accepted a draft for $4,221.49 for the accommodation of the firm of Matson & Henderson, Louisana, Missouri, upon the agreement between himself and said Matson & Henderson, that they would make shipments of hogs to defendant in St. Louis, the proceeds to be applied to the payment of this draft, which had been deposited by the holder in the National Bank of Missouri for collection. After the acceptance of this draft by plaintiff, and after some of the hogs had been already shipped to defendant in accordance with the agreement between plaintiff and Matson & Henderson defendant (who was not a member of that firm) signed and delivered to plaintiff a written instrument purporting to be an article of agreement between plaintiff and defendant, which, after reciting that Matson & Henderson have shipped, and are to continue to ship, hogs to pay off said acceptance, concludes thus: "I agree to appropriate of the net proceeds, as far as it will go, to take up said acceptance. A. S. Matson." The acceptance matured on December 25th. On January 3d defendant rendered to Matson & Henderson

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an account of sales of 306 hogs, showing a balance of $3,021.12 net, which he reports as deposited, that day, to their credit in the National Bank of Missouri. There was evidence, also, tending to prove that, on that day, he went to the bank with these net proceeds, handed them to the teller, with a copy of the so-called agreement between himself and plaintiff, telling him to apply these funds according to the terms of that paper; the teller examined the paper, took the money, and the defendant heard no more of it until he was subsequently informed that the bank had appropriated only $1,486.24 of this money to the acceptance of plaintiff, and applied the balance to another acceptance of Henderson & Matson then in the bank; that, upon learning this, defendant saw the officers of the bank and endeavored to have the error corrected, but they refused to make any change. These statements as to transactions between defendant and the bank are uncontradicted; unless it should be claimed that the report of sales by defendant to Matson & Henderson, with its accompanying statement that the $3,021.12 was that day by him deposited to their credit in the bank, is inconsistent with the testimony of a special direction to the officers of the bank to apply the fund to the payment of this particular draft.

Plaintiff sues defendant herein for failure to perform the alleged agreement to appropriate all the net proceeds of the hogs to the payment of the draft; and says that, by reason of this failure, there was left unpaid on said draft the sum of $1,213.20, which plaintiff paid on February 13, 1872. He lays his damages at $2,000. There was a verdict and judgment in the court below for $1,757.40; and defendant, having unsuccessfully moved to set the same aside, brings the case to this court by appeal.

The court, at the instance of plaintiff, granted an instruction to the effect that, if defendant, on a state of facts substantially as they have been set forth above, placed the net proceeds, $3,021.20, to the credit of Matson & Henderson

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at the National Bank of the State of Missouri, having previously entered into an agreement with plaintiff to appropriate said proceeds to the payment of the draft accepted by plaintiff, then plaintiff is entitled to recover the difference between the amount deposited and the amount credited on the draft.

Also the following:

"Although the jury may believe from the evidence that, at the time defendant made the deposit at the National Bank of the State of Missouri, he told the officers of said bank for what purpose he desired the amount deposited appropriated, that does not relieve the defendant from his obligation to the plaintiff, if you shall find that he agreed to appropriate the same to the taking up of the draft drawn on plaintiff by F. C. Todd."

To the giving of these instructions defendant excepted.

The court, at the instance of defendant, gave the following instruction:

"If it appears from the evidence that the defendant took the whole net proceeds of his sale of hogs under the contract sued on to the bank mentioned in the contract, and directed the officer of said bank receiving the money to apply it according to the terms of said contract, a copy whereof was then and there exhibited to said officer for that purpose, and the bank having in its possession the draft shown in evidence, then the defendant is not liable for a misappropriation of such money by the bank, and the plaintiff cannot recover therefor."

Defendant asked the following instruction, which was refused, and defendant excepted:

"If it appears that the draft drawn by Todd & Bartlett in favor of Matson & Henderson, and accepted by Bartlett, was placed by the holder in the National Bank of the State of Missouri for collection, and that defendant was informed of the fact by the plaintiff at the time of the making of the contract sued on, then the said bank, for all

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the purpose of this suit, was the agent of the holder of the draft, and of the plaintiff so far as he was interested in its collection, and if there was any failure by said bank to properly apply the money paid by defendant for application to said draft, then the defendant is not responsible to the plaintiff therefor, and the latter cannot recover in this action."

This last instruction was warranted by the evidence, and is a correct statement of legal principles. Defendant could not take up the draft, because the funds in his hand were insufficient; and if, in obedience to his instructions, he paid the money into the bank, with directions to apply it upon plaintiff's draft, his responsibility was at an end. The refusal of this instruction necessitates the reversal of the case; and, as a new trial must be had, we will look into the other questions presented by the record.

The contract sued on expresses no consideration, it is said, and it is insisted that it was error in the court to admit it in evidence against the objection of the defendant, based upon the theory that it was not competent to show a consideration *aliunde*. But in this action of the court there was no error. It is clear, by the common law, that there must be a consideration for a written contract not under seal, and it is equally clear that this consideration need not be expressed in the written contract so as to make a part of it, but where none is expressed in an action on such a contract a consideration may be averred, and it may then be proved by oral evidence. In some of the States this rule has been held to apply even in cases within the statute of frauds; though the English rule is that, in cases within the statute, the consideration must be in writing. But where the contract need not be in writing, if reduced to writing, the consideration may be shown, though not expressed. This contract was not a contract to answer for the debt of another, and its consideration could, undoubtedly, be shown.

But does any consideration to support the contract

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appear from all the evidence in the case? This is a question of some difficulty. The petition states the consideration to have been the shipment of hogs to defendant, and the acceptance of the draft by plaintiff; and it was proved that defendant knew of the promise of Matson & Henderson to ship the hogs to him to be sold to meet the draft, and of the acceptance by plaintiff. But the acceptance of the draft was not for defendant's benefit, who was in no way connected with Matson & Henderson; it had already taken place when the agreement was signed; and, as to the shipment of hogs, it does not appear to be a consideration moving from plaintiff, as he does not promise that the hogs shall be shipped. "You have accepted a draft for the accommodation of Matson & Henderson," writes defendant to plaintiff, in effect, "and they are shipping hogs to me to sell and pay the draft, and I will appropriate the net proceeds of the sale to that purpose." Does that written statement impose any legal obligation upon defendant which did not exist in full force without it? If not, the argument is not helped by the testimony outside of the writing; because, with all the testimony together, the alleged contract amounts to no more than this. We do not think that the writing helps the case at all; and, as the action is upon this instrument, a demurrer to the petition would have been fatal to the action in this form.

But, after verdict and judgment, it is too late to consider that, if, waiving the question of an express promise from defendant to plaintiff, enough facts are alleged and proved to warrant a recovery. If money is handed by A to B, for the use of C, and C consents to the trust, C may have an action for it. Now it clearly appears that these hogs were sent by Matson & Henderson to defendant, upon the trust that he would sell them and apply the net proceeds to the payment of the accommodation paper upon which plaintiff was liable as acceptor. Matson & Henderson could, therefore, have recovered from defendant if he had converted these funds

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to his own use; and to avoid circuity of action plaintiff would, under these circumstances, have been subrogated to the rights of Matson & Henderson, and might have commenced suit in his own name so long, and only so long, as a right of action remained to them. But he could not sue if, the obligation of defendant to them being discharged, Matson & Henderson could not; and they clearly could not, under the circumstances of this case, for there is no question but that defendant either applied the whole money to the payment of the acceptance of plaintiff, or else deposited it in bank to the credit of Matson & Henderson, with their knowledge and consent, and as to them he is fully discharged. We think, then, that there is a total failure of evidence to support the verdict, and that, on this ground, the case should be reversed.

We have gone thus at length into the question of consideration because upon that question the case seems really to hinge. But the case must have been reversed on the ground that the instructions are erroneous and furnish no intelligible direction to the jury. In the second instruction for plaintiff the jury are told that, if defendant agreed to appropriate the money in question to taking up plaintiff's draft, the fact that he told the bank officers to what purpose to apply the money would not relieve him; and in the instruction of defendant they are told that, if defendant gave the officers the directions detailed in the testimony as to the application of the money, he is completely discharged. These instructions cannot stand together. There is no question that defendant paid in the whole money received to the bank; there is no question as to what directions were given to the bank officers as to the application of the money, if any directions were given at all, as to which, also, there seems to be no reasonable doubt. The only possible question as to the money is whether the statement on the account of sale, "deposited by me this day at the National Bank to your credit," is to be taken as contradicting the testimony that

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special instructions were given to the bank officers by defendant, when depositing the money, as to the particular disposition of the fund. These two instructions are, therefore, not merely confusing, but quite irreconcilable, in view of the facts as presented by the record.

The judgment of the Circuit Court will be reversed and the cause remanded. Judge GANTT concurs; Judge LEWIS, having been of counsel, did not sit.

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ISAAC N. ARMENTROUT, Appellant, v. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, Respondent.

February 14, 1876.

1. After delivery of goods to a railway company, and receipt of the bill of lading therefor, the consignor loses all right of control over them, except the legal right of stoppage *in transitu*.
2. In case of injury to goods, the act of God cannot be set up as a defense by the carrier, if guilty of previous misconduct or neglect by which the exposure resulting in the loss was occasioned.

APPEAL from St. Louis Circuit Court.

Reversed and judgment.

Bereman & Smith, for appellants, cited: Wolf *v.* American Ex. Co., 43 Mo. 421; Bos. & Pul. 582; 2 Red., L. B. (5th ed.) 202, sec. 6; Comstock *v.* Affoelter, 50 Mo. 411; Davis *v.* Peck, 8 Tenn. 330; Arbuckle *v.* Thompson, 37 Penn. 170; Sanford *v.* Housatonic R. W., 11 Cush. (Mass.) 155; Green *v.* Clark, 13 Barb. 62; 2 Redf. on Ry., sec. 10; Coombs *v.* Bristol & Exeter Ry. Co., 3 H. & N. 4; Davenport N. Bank *v.* Homeyer, 45 Mo. 145; Bostwick *v.* Baltimore & Ohio R. R. Co., 55 Barb. 137; Long *v.* New York Central R. R. Co., 50 N. J. 76; 1 Pars. Mer. Law, 137, and notes; Odell *v.* Boston & Maine Ry. Co., 109 Mass. 50; Bryant *v.* Nix, 4 M. & W. 788; Grove *v.* Brien, 8 How. 438; Gibson *v.* Stevens, 8 How. 398; Holbrook *v.*

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Wright, 24 Wend. 169; Dows *v.* Green (Smith, J.), 24 N. Y. 645; Blossom *v.* Champion, 37 Barb. 563.

Blodgett & Dickson, for respondents, cited: Ang. on Car., sec. 511, p. 476; sec. 499, p. 468; Griffith *v.* Ingelow, 6 Serg. & R. 437; Ballentine *v.* North Missouri R. R. Co., 40 Mo. 505; 2 Greenl., sec. 256; Darwin *v.* Potter, 5 Den. (N. Y.) 306–308; Pendle *v.* Rench, 4 McLean, 259.

BAKEWELL, J., delivered the opinion of the court.

Plaintiff sues defendant, a common carrier, for breach of contract of affreightment, in not fulfilling its undertaking with plaintiff that it would securely keep and safely carry over its road, from Ottumwa, Iowa, to St. Louis, Missouri, and in reasonable time securely deliver to plaintiff's agent, in St. Louis, 100 boxes of eggs, whereby said eggs were totally lost to plaintiff, as he alleges, to his damage $2,000.

The case was tried by the court, a jury being waived, upon the following agreed statement of facts.

Plaintiff bought the 100 boxes of eggs in question of McCullough & Lilburn, at Ottumwa, Iowa, at the price of $1,528.04; he paid $10 in cash, and agreed with McCullough & Lilburn that, for the balance of the purchase price, they should draw against the shipment on Bussy & Co., at St. Louis, with the bill of lading, or receipt therefor of defendant, attached; of all which defendant had no knowledge.

Bussy & Co. were the commission merchants of plaintiff, to sell said eggs for plaintiff's account on arrival, and had no other interest in said eggs or the proceeds.

That on November 25, 1872, McCullough & Lilburn, accordingly delivered said eggs to defendant at Ottumwa, Iowa, and took its bill of lading, or receipt, therefor, which is on file in this cause, and may be read in evidence by plaintiff.

That thereupon George McCullough, one of the firm of McCullough & Lilburn, requested defendant to hold said eggs until ordered by them to be sent forward, the particu-

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lars of that transaction being set forth in an affidavit of one Phillipps, as follows:

"On morning of November 25, 1872, Geo. McCullough came to my office, in Ottumwa, and requested bill of lading for 100 boxes of eggs, to be shipped to Bussy & Co., St. Louis, and not load till following day. This I refused. The eggs were loaded the same day, November 25th, and Geo. McCullough requested car to be held at their risk until draft was accepted. Afternoon of November 27th he gave order to forward car, which was done on first train, morning of 28th, A. M., car 798."

This request to hold and agreement to take all risks was made verbally.

That on November 25, 1872, said McCullough & Lilburn drew their draft on Bussy & Co. for said sum of $1,518.04, with said bill of lading, or receipt, attached; that the same, with bill of lading, or receipt, attached, were presented to Messrs. Bussy & Co., for acceptance, on November 27, 1872, and the draft was by them accepted, and paid by them on November 30, 1872, and charged to account of plaintiff, as plaintiff and Bussy & Co. had agreed it should be, and said draft is annexed hereto, and may be read in evidence herein.

That on November 28, 1872, McCullough & Lilburn directed defendant to forward the eggs to the consignees, Bussy & Co., at St. Louis, and it was at once done. They arrived at St. Louis, at ten A. M., on Sunday, December 1st, being a reasonable time after being forwarded, and notice of their arrival was given to Bussy & Co. on Monday, December 2d, as soon as could be done after their arrival; and that three days is ample and the usual time for freight to be carried from Ottumwa to St. Louis.

That Bussy & Co. had sold said eggs to arrive, on November 30th, at the price of $1,641.78, but, owing to the eggs having been frozen, they were sold to the best advantage, for $1,156.62; the said price of $1,641.78 being the usual

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and market price thereof in St. Louis, and said sale being lost because the eggs were so frozen.

That said eggs were so frozen because of the extreme cold weather on the route, and they would not have been frozen if sent forward on November 25, 1872.

That defendant had no knowledge of the interest of any one in the eggs, other than that of the consignor, except that shown, if any, by the receipt, or bill of lading, and by the affidavit of Phillipps.

That plaintiff, by his commission merchants, Bussy & Co., consignees, paid defendant the freight, $64, on said shipment, on its arrival in St. Louis.

The bill of lading is in the usual form, and sets forth that, on November 25, 1872, the date of the bill, there were received, in good order, at Ottumwa, by defendants, from McCullough & Lilburn, to be delivered to Messrs. Bussy & Co., at 16 South Commercial street, St. Louis, Missouri, 100 boxes of eggs, marked "M. & L., Ottumwa, Iowa, for Bussy & Co., St. Louis, Missouri."

The court found for defendant. Plaintiff duly excepted; and, his motion for a new trial being overruled, the case is brought here by appeal.

On this statement of facts the plaintiff was, in our opinion, entitled to recover. The delivery to the defendant, under the circumstances stated, vested the goods in the consignee; the defendant was from that moment liable to plaintiff, and its liability was that of a common carrier, and not that of a warehouseman. The goods were injured by an exposure which would not have occurred had the goods been forwarded without delay; and the delay which occasioned the damage was wholly unauthorized by the consignee or his agent, and occurred at the direction or suggestion of a third party who had no legal right whatever to control the goods.

These principles may be taken to be now well settled, and it is too late to attempt to change them. They are also consonant with common sense and the recognized customs

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of trade in this country. A bill of lading is taken by the consignor. It is a statement of the carrier to the effect that he has received a certain weight or quantity of a certain description of merchandise, to be forwarded with all reasonable dispatch to a certain person named in the bill. To this bill of lading is attached, as in this instance, a draft on the consignee for the value of the goods, which is forwarded by the shipper to his agent at the point of consignment, for presentation to the consignee for acceptance and payment. This draft and bill of lading attached arrive, in the course of mail, before the goods, and are the assurance to the consignee that the goods are on the way. On the faith of the bill of lading he accepts and pays the draft. It is, therefore, conclusive on the carrier as to persons who have acted on the faith of his contract, and he will not be allowed to modify it without their consent. Any other rule would be destructive of commerce. What commission merchant would be safe in accepting drafts drawn against shipments; what bank would take bills of lading as collaterals, and make the necessary advance upon them, if the shipper, at will, could forward the bill of lading and detain the goods? If the carrier, in this instance, could have detained the goods at the request of the consignor, after the bill of lading was out, until the draft was heard from, he might, with equal safety to himself, have given back the goods to the shipper after the acceptance of the draft by the consignee. The vendor, in the case stated, had no such right over these goods as he attempted to exercise. From the moment they were received by the carrier he parted with all right to control them in any way, except the right to stop them, before they reached their destination, in the sole case of the insolvency of the consignee.

There was something said in argument as to this being a case of injury by the act of God. The severe cold which injured the eggs could not have been prevented, nor, perhaps, foreseen, by man; but, if the carrier had done his

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duty, the goods would have arrived at their destination before the frost. The carrier is liable for a loss arising from an inevitable necessity existing at the time of the loss, if guilty of previous misconduct or negligence by which the exposure which resulted in the loss was occasioned.

For the reasons stated the judgment of the court below must be reversed. But, inasmuch as every fact necessary to a final judgment in favor of plaintiff would appear to be fully set out in the agreed statement of facts, it does not seem necessary to remand the cause for a new trial, and we accordingly give judgment here for plaintiff for $721, being the difference between the amount for which the eggs were sold to best advantage, on their arrival, and the sale which was lost by the default of defendant, after adding thereto interest from the date of the commencement of the suit to the entry of judgment here. The other judges concur.

VALENTINE STOCKE, Respondent, v. BENJAMIN MUELLER, Appellant.

February 14, 1876.

1. An appellate court must set aside a judgment where there is no evidence whatever to support it.
2. In an instruction containing the words "unless *each member of the jury* believe," etc., and setting forth what facts must be found in order to a verdict for the plaintiff, it is not erroneous for the court to strike out the words "each member of."

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Hitchcock, Lubke & Player, for appellant, cited: Wag. Stat. 782, sec. 1 (ed. 1872); Wag. Stat. 656, 657, secs. 5, 7; Tilford v. Ramsey, 43 Mo. 421; Blake v. Paulin, 22 Mann. 393; Moses v. Norton, 36 Mann. 113; Elder v. Warfield, 7 Har. & J. (Md.) 391.

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Joseph T. Tatum, for respondent, cited: Brown on Stat. Fr. (3d ed.), sec. 157, and cases cited.

Bakewell, J., delivered the opinion of the court.

Plaintiff sues defendant for a sum claimed to be due as balance of account for goods sold by plaintiff to defendant. The plaintiff testified that one Boehm, a brother-in-law of defendant, wanted to purchase flour of him, but he was unwilling to give credit to Boehm, whereupon Boehm stated that he had authority to buy for defendant. "So I called on defendant, and asked if he, Mueller, had a bakery on Market street, between Nineteenth and Twentieth. He said, Yes. I asked him whether he run that bakery. He said, No; his brother-in-law run it. I asked him whether he gave him a power of attorney to buy flour for him, and he said he had a mutual agreement with Philip Boehm to buy flour in his (defendant's) name. I asked him if he intended to pay for what flour Philip Boehm might buy for Benjamin Mueller. He said, Yes; why? I told him that Boehm bought two loads of flour in Mueller's name, and I asked him if he intended to pay for it. Benjamin Mueller says: Give him all he buys, and I pay for it." And, on cross-examination, plaintiff said: "Mueller said he would pay for all that was bought for the bakery. Boehm wanted two mules for the bread wagon; Mueller used them. I never saw him drive them, but I have seen them a hundred times in the bread wagon. I delivered them to Boehm for Mueller." There was, also, evidence that another person sold flour to Boehm in Mueller's name, and that Mueller had said it was all right; also, that the dray tickets for the flour delivered by plaintiff to the Camp Spring Mill, on Market street, which Boehm was running, were made out in Mueller's name, and that there was no name of any proprietor about the mill; also, that when the bill sued on was presented to defendant, made out in defendant's name, he said it ought to be settled, and he would see Boehm about it; also, that the goods were charged by plaintiff to Mueller, and not to Boehm.

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The court gave the following instruction for plaintiff:

"If the jury believe from the evidence that defendant, Mueller, represented to plaintiff that Philip Boehm was carrying on the bakery on Market street in his, the defendant's, name, and that defendant was responsible for, and would pay for, such supplies for the said bakery as the said Boehm should buy, or that the said Boehm had authority to buy such supplies in the name of defendant; and if the jury further believe from the evidence the articles sued for were furnished by the plaintiff for the said bakery in pursuance of such representations, and that the prices charged for the same are correct, they will find for the plaintiff."

To the giving of this instruction defendant excepted.

The court gave the following instruction for defendant:

"The jury are instructed that the burden of proof in this case is upon the plaintiff, Stocke; and that they must find for the defendant, Mueller, unless they are satisfied from the evidence, and circumstances shown in evidence, in this case that, at the time when the plaintiff sold and delivered the flour and mules, for the value of which this suit is brought, the defendant, Mueller, was proprietor of the bakery mentioned by the witness, or that, before such sale, the defendant authorized Philip Boehm, upon the credit of, and in, defendant's name, to purchase and receive said articles; and, in considering the evidence, the jury may disregard the testimony of any witness who they believe has willfully sworn falsely to any material fact here in controversy."

This instruction, as asked, read, "unless *each member of the jury* are satisfied," etc. The court struck out the words "each member of the jury," and inserted "they" in place of them. To this action of the court defendant excepted.

The court also gave the following instruction for defendant:

"The jury are also instructed that, although they may

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believe that defendant authorized Philip Boehm to use his name for the purpose of getting credit with the witness Meyer for flour to be used in the bakery named by the witness; and that defendant, at another time, expressed to plaintiff the opinion that said Boehm was good for what he had purchased, or might hereafter purchase, from the plaintiff; and that defendant, at another time, promised to plaintiff's agent that he would try to induce said Boehm to settle or pay plaintiff's bill, these facts are not competent to make defendant liable to plaintiff, Stocke, in this action, if from the evidence the jury also believe that defendant was not the proprietor of the bakery mentioned by the witness (or authorized the purchase of the flour); and the jury are further instructed that the fact that plaintiff, upon his own books and upon the pass-book held by said Boehm, charged in defendant Mueller's name the articles here sued for, does not make defendant liable for the value of said articles unless defendant authorized such charges to be made against him."

This instruction, as given by the court and set out above, was the instruction asked by defendant, except that the court modified it by inserting the words "or authorized the purchase of the flour." To this modification of the instruction no exception is saved.

The jury found for the plaintiff. A motion for a new trial was overruled, to which defendant excepted, and brings the case here by appeal.

An oral promise to pay the debt of another is void, under the statute of frauds. If, therefore, there was no evidence whatever in this case that the debt was originally the debt of defendant, the verdict must be set aside. The bill of particulars filed with the petition is not incorporated into the bill of exceptions, but it is evident from the testimony that the articles sold and delivered were flour, and also a pair of mules. Now, there is nothing whatever in the testimony tending in any degree to show that defendant, Mueller,

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ever authorized, or in any way sanctioned, the purchase of any mules, or of anything but flour. There is not, therefore, any evidence to support the verdict, and, for this reason, the judgment of the courts below must be reversed.

There was no error in changing the words "each member of the jury" into "they," in the instruction granted. The jury is each member of the jury, in their collective capacity—eleven jurors are not the jury.

The judgment of the Circuit Court is reversed and the cause remanded. The other judges concur.

A motion for rehearing was filed, which, however, presented no point not previously considered, and was overruled.

JAMES LUTHY, Plaintiff in Error, *v.* STEPHENSON WOODS *et al.*, Defendants in Error.

February 14, 1876.

When a party not subject to garnishment is indebted to an insolvent person, a court of equity will, in some cases, aid a creditor of such insolvent in appropriating this credit to the satisfaction of his demand.

ERROR to St. Louis Circuit Court.

Reversed and remanded.

A. R. Taylor, for plaintiff in error, cited: Pendleton *v.* Perkins, 49 Mo. 565; Wag. Stat. 1012; Henderson *v.* Dickey, 50 Mo. 165; Almett *v.* Leper, 48 Mo. 321; Murry *et al. v.* Freeman *et al.*, 44 Mo. 521; Turner *v.* Adams, 46 Mo. 99; McDowell *v.* Cochran, 11 Ill. 31; Postlewaite *v.* Howes, 3 Clarke (Iowa), 366; Hadden *v.* Spades, 20 Johns. 554; Bigelow *v.* Congregational Society, 11 Vt. 283; Williams *v.* Hubbard, Watkins' Ch. 28; Kippen *v.* Glancy, 2 Blackf. (Ind.) 336; Scott *v.* McMillan, 1 Litt. (Ky.) 302; Farrar *v.* Haselden, 9 Rich. (S. C.) Eq. 331; Greenway *v.* Thomas, 14 Ill. 272; Pope *v.* Solomon, 36 Ga. 341.

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R. E. Rombauer, for defendants in error, cited: Gen. Stat. 1865, ch. 165, sec. 2; Doan *v.* Holly, 25 Mo. 357–359; Pendleton *v.* Perkins and City of St. Louis, 49 Mo. 565; Heller *v.* Stremmel, 52 Mo. 309.

GANTT, P. J., delivered the opinion of the court.

Luthy filed a petition in the St. Louis Circuit Court, in which he stated, first, a legal demand against Woods & Barnes, and asked judgment for it against them; and then proceeded to state that they were utterly insolvent, having no means or property that could be reached by legal process; that the Board of President and Directors of the St. Louis Public Schools was a municipal corporation, and not subject to garnishment; that said corporation was indebted to Woods & Barnes in the sum of $2,700; that by no means could this fund be subjected to the satisfaction of the claims of the creditors of Woods & Barnes except by the equitable interposition of the St. Louis Circuit Court; that the Bremen Savings Bank claimed the said fund; and concluded with a prayer that the court would give him judgment for his debt against Woods & Barnes, and order the Board of President and Directors of the St. Louis Public Schools to pay him, out of the sum they owed to Woods & Barnes, the amount of such judgment, with costs; that the Bremen Savings Bank should show cause against this judgment, if any they had; and for other and further relief. As against Woods & Barnes, judgment was perfected in the sum of $1,360.34. A general demurrer was filed by the Board of, etc., Public Schools, while the Bremen Savings Bank made no answer. The court sustained the demurrer of the schools, and gave final judgment in their favor and in favor of the bank. Plaintiff sued out this writ of error.

1. The learned counsel for plaintiff invokes the application to the case at bar of the principle declared in *Pendleton* v. *Perkins and the City of St. Louis*, 49 Mo. 565, and *Turner* v. *Adams*, 46 Mo. 99.

In the case of *Pendleton* v. *Perkins* et al. the facts were

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precisely what they are here, except that Perkins was a non-resident, and no means existed of getting judgment against him; here Woods & Barnes are residents, and a judgment could be had against them without difficulty. Does this difference of facts prevent the application to the case at bar of the principles declared by the Supreme Court on that occasion?

It cannot be said that the plaintiff has exhausted his legal remedies against Woods & Barnes. Clearly, he has done nothing of the kind. But he declares that it would be vain and useless to attempt to put in use against them any legal process; that they are completely proof against everything of this nature, and that a resort to the equitable jurisdiction of the court is all from which he can hope for relief. Will the court, nevertheless, compel him to go through an empty form? or is it an empty form?

If it be an empty form, the court will not compel him to comply with it. *Lex neminem cogit ad vana seu inutilia*—the law compelleth no man to do a vain or useless thing. This maxim of the common law and of common sense was very lately approved by the decision of the Supreme Court of Missouri in the case of the *State Savings Association* v. *Kellogg & Co.*, 52 Mo. 583. There the plaintiff had sued a stockholder of an insolvent corporation without bringing suit against the corporation within a year of the accrual of the cause of action, as in terms prescribed by the 13th section of chapter 69 of the General Statutes of Missouri, page 370. The corporation had become bankrupt, and it was alleged in the petition that it was utterly insolvent. The defendant, however, insisted that it was essential that the requirement of the statute should be strictly and literally observed; and of this opinion was the Circuit Court. The Supreme Court reversed the judgment, and in doing so used language so applicable to the principle of the present case that we cannot forbear quoting it: "But it is further contended that this action cannot be maintained, because no

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suit was first brought against the company. The statute (Wag. Stat. 336, sec. 13) provides that 'no stockholder shall be personally liable for the payment of any debt contracted by any company formed under this chapter * * * unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due,' etc. The law does not require useless things, and what possible good could have been accomplished by bringing suit against the company? It would only have been accumulating costs for the plaintiff to pay, in addition to its failure to obtain any satisfaction.

"Before the debt was sixty days old the company was decreed a bankrupt. It had no assets whatever, and it would have been an idle ceremony, a useless form, to have proved up the claim in the Bankrupt Court, for the estate was wholly without funds or means of any kind. The statute plainly refers to ordinary actions where there is a subsisting corporation. But here, before the limitations had expired, the corporation was dissolved. The mere bringing of a suit under such a state of facts would have been idle, vain, and fruitless."

Says Kent, C. J., in *Trustees of Huntington* v. *Nicoll*, 3 Johns. 566–598: "It is one of the maxims of the common law, which is also a dictate of common sense, that the law will not attempt to do an act which would be vain, or to enforce an act which would be frivolous.

"The facts [misprinted *acts* in the report] in this case surely take it out of the dry letter of the law, and furnish a remedy within its spirit and meaning. A literal compliance would have been wholly futile, and the reason for not proceeding is, I think, good, legal, and sufficient."

Nothing need be said in illustration of a principle so clearly vindicated. If the bringing of a suit and the obtaining of a judgment against the debtor were indeed an empty form, the law will not exact compliance with it.

In 46 Missouri, at page 99, the same learned judge, who

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delivered the opinion of the court just quoted, used the following language:

"The rule is that it is necessary to exhaust all legal remedies before applying for the assistance of a court of chancery, and this is usually evidenced by a judgment, the issuance of an execution, and a return of *nulla bona*. But the cases hold that, where it is shown that the judgment debtor is insolvent and that the issue of an execution would necessarily be of no practical utility, its issue might be dispensed with. *Merry* et al. v. *Fremon* et al., 44 Mo. 518; *McDowell* v. *Cochran*, 11 Ill. 31; *Postlewaite* v. *Howes*, 3 Clarke (Iowa), 366. Chancellor Kent, in *McDimutt* v. *Strong*, 4 Johns. (N. Y.) Ch. 690, stated the true doctrine to be that, if the creditor has taken and exhausted all the means in his power at law, he will be entitled to the aid of a court of chancery to discover and apply the property to satisfy the execution."

It may, we think, be fairly concluded that if, before commencing the present action, the plaintiff had reduced his claim against Woods & Barnes to judgment and an execution thereon had been returned *nulla bona*, or if Barnes and Woods had been non-residents, the court below would have entertained this application. The cases cited from our own Supreme Court establish that the return of *nulla bona* to an execution is not the only evidence to which a court of chancery will listen on an issue of utter insolvency. Does the objection taken by the Board of Public Schools to what is called the blending of legal and equitable causes of action in this petition suffice to justify the refusal of the Circuit Court to afford the relief prayed?

We think the question is answered in the negative by the case of *Pendleton* v. *Perkins* et al., 49 Mo. 565. How otherwise, indeed, than by combining, for the purpose of administering the equitable relief, the legal claim against the debtor with the prayer for the interposition of the arm of equity, could a case be made for invoking the latter?

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It all comes back to the inquiry: "Has the plaintiff any remedy at law?" There may be a possibility of such remedy. If it has any existence, he must resort to it. He may defer his application to the court of equity until he has proved rigorously that at law he is remediless. Ordinarily this is demonstrated by the practical exhaustion of all legal remedies, without results, by obtaining judgment, issuing execution, and a return of *nulla bona*. These things, however, are only evidence of the fruitlessness of a resort to legal process. If the futility of such a resort can be otherwise shown, we do not perceive how, in harmony with the "reason and principle of the decision" in the case of *The State Savings Association* v. *Kellogg* et al., the plaintiff shall be confined to the more formal, expensive, and tedious demonstration. We think the absence of any legal remedy sufficiently appears by the petition in this case, and, according to the decision in *Pendleton* v. *Perkins* et al., the plaintiff is entitled to relief by the extraordinary intervention of a court of equity.

The judgment of the Circuit Court is reversed and the cause remanded for proceedings in conformity with this opinion.

JOHN J. SQUIRE, Respondent, *v.* JAMES C. WRIGHT *et al.*, Appellants.

February 14, 1876.

1. In a suit to recover damages for the discharge of the plaintiff from an employment to which he was entitled under a contract, if the question of his qualifications for such employment becomes material, the defendant should be permitted to ask him, on cross-examination, whether he was competent for such employment.
2. The burden of proving incompetency of the plaintiff is on the defendant.
3. In such a case it is proper for the defendant to prove, in mitigation of damages, that he offered to give the plaintiff employment at the same compensation, in the same general line of business.

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ERROR to St. Louis Circuit Court.

Reversed and remanded.

Alex. J. P. Gareschè, for appellants, cited: Thompson v. Wood, 1 Hilt. (N. Y.) 97; Goodman v. Pocock, 15 Q. B. 576; Smith's M. & S., 73 Law Lib., note *g*, p. 90, (95); Best on Ev., 64 Law Lib., p. 190 (293); Best on Ev., 64 Law Lib., p. 193 (299); Pond v. Wyman, 15 Mo. 183, 184; 2 Greenl. on Ev. (4th ed.), sec. 261; Ream v. Watkins, 27 Mo. 518; Springdale Association v. Smith, 32 Ill. 259.

P. E. Bland, for respondent, cited: Banister v. Henn, 45 Mo. 567; Shacklett v. North Missouri Coal and Mining Co., 50 Mo. 410.

GANTT, P. J., delivered the opinion of the court.

Squire sued Wright *et al.*, to recover damages for the non-performance of a contract to employ him for a year, at $6 per diem, in the capacity of foreman of a sash, door, and blind factory. He was discharged in October, 1868, a little more than three months after his term of service commenced. The answer set up that he was totally incompetent, and was, therefore, discharged as foreman, but told to take charge of any machinery and do any work in the factory for which he was competent, and that defendant would pay him the price he was to receive for services as foreman. Defendants say that he refused to accept any such employment, but absented himself from the factory altogether. They also pleaded a counter-claim of $300, for money borrowed; alleging that they had paid him all the money due up to October 17th, when he ceased to work, except $16.

The reply asserts that plaintiff was competent, and that he was not discharged for incompetence, but does not deny any other matter alleged in the answer.

The plaintiff was examined as a witness. He was asked, on cross-examination, many questions, of which we can only judge by the answers he gave, which are put down in what is called the narrative form. He said: "My work was, not

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merely to put machinery into operation, but to prepare knives, cutters, etc., have them properly arranged, placing them, receiving orders, seeing that the workmen properly filled them, laying out work, seeing to its prompt execution; no part of my business to make estimates for work, but have done so from the list of prices, which refers only to ordinary work. Don't know that I could have estimated for ordinary work to satisfaction of my employers, but would to my own." The question was asked: "Were you competent for such work?" The plaintiff objected to this question; the court excluded it, and defendants excepted.

The court gave the following instructions at the request of plaintiff, defendants excepting:

1. "The plaintiff was not bound, under the said contract, to serve the defendants in any other capacity than that of foreman; and if the jury believe from the evidence that either of the defendants stated to the plaintiff that he was no longer foreman, and that they had concluded to dispense with his services as foreman, they are instructed that such statement or statements, substantially the same, constituted a discharge of the plaintiff, and the effect was not relieved or altered by the offer to him of any other position."

2. "The law presumes that the plaintiff was competent, and possessed of the necessary skill and ability to perform the duties of said employment, and the burden of proof to the contrary is on the defendants."

The defendants asked this instruction, and excepted to its refusal, viz.:

"If the jury believe from the evidence that defendants offered to give plaintiff employment in the same general line of business as that in which they engaged him under the terms and conditions of the contract read in evidence, and at the same compensation, and plaintiff refused to accept the same, the defendants are not liable in this action."

1. Whether the question asked of plaintiff was prop-

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erly excluded, must depend on the inquiry whether it was the business of a foreman, of such an establishment as that in which the plaintiff was employed, to make estimates for work. He says it was not. One of the defendants says it was. If it was part of his business, as foreman, and he was not competent to do it, clearly it was important for the defense to show it. We cannot see how it could be shown more satisfactorily than by the testimony of some person acquainted with the capacity of the plaintiff, nor how any witness can be selected who can be presumed to be better acquainted with that subject than the plaintiff himself. It is objected that the question sought to elicit an opinion. The same objection might be made to the question: "Can you perform a computation in arithmetic?" Of course it assumes that the witness knows the qualities which enable any one to make estimates for work, and the inquiry is whether he possesses those qualities. We can hardly conjecture that plaintiff would, by his answer, have discredited his own competency, and yet his counsel seems to have feared this. If he had pronounced himself incompetent to perform such work, the question would still remain: "Was such work part of your business as foreman?" We think this question should have been allowed.

2. The error assigned in respect of the second instruction quoted as having been given for the plaintiff cannot be sustained. Its only scope was to tell the jury that the burden of showing the incompetency of the plaintiff lay on the defendants, and this was correct.

3. The first instruction given at the instance of the plaintiff, and the refused instruction quoted of the defendants, present in substance the same point, viz.: Whether the offer of defendants to give plaintiff employment "in the same general line of business as that in which they engaged him, * * * and at the same compensation," should have been received in defense of this action.

Strictly, such an offer might not have been a full defense

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(*Armfield* v. *Nash*, 31 Miss. 361; *Emmens* v. *Elderton*, 13 C. B. 495), but we think it was clearly admissible in mitigation of damages (*Pond* v. *Wyman*, 15 Mo. 175); and yet the language of the plaintiff's instruction was that the effect of the discharge of plaintiff "was not relieved or altered by the offer to him of any other position." This language was very broad—improperly so, we think. The jury were warranted in understanding it, as we suppose the plaintiff's counsel understood it, that an offer to plaintiff of any employment whatever, except that from which the defendants discharged him, was one he was at liberty to refuse. If the offer had come from a stranger, we cannot see how the plaintiff could have justified such a refusal, and we perceive no reason why he was at liberty to do so when the offer came from the defendants. The judgment will be reversed and the cause remanded. All the judges concur.

N. M. Sheffield *et al.*, Respondents, *v.* Charles Balmer *et al.*, Appellants

February 14, 1876.

B agreed with A to pay him a certain sum for making a certain publication in the Sunday edition of a named periodical, for one year. In the course of the year A discontinued the Sunday edition, and continued the publication in the Saturday edition. B soon afterwards ordered the discontinuance of the publication, and paid for so much of it as had been made before the date of the order. A, however, continued the publication until the end of the year, and then sued to recover the balance of the sum fixed by the original contract. *Held*, that he could not recover.

Appeal from St. Louis Circuit Court.

Reversed and remanded.

Hor. D. Wood, for appellants, cited: Helm *v.* Wilson, 4 Mo. 41; Downey *v.* Burke, 23 Mo. 228; Marsh *v.* Richards, 29 Mo. 99; Stout *v.* Tribune Co. 52 Mo. 347; Sheffield *v.* Balmer, 52 Mo. 477; Franz *v.* Hildebrand, 45 Mo.

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121; Camp *v.* Heelan, 43 Mo. 591; Taylor *v.* Beck, 13 Ill. 376; Wag. Stat. 504, secs. 32, 35; State *v.* Adams, 20 Mo. 214; Smith *v.* Wilcox, 24 N. Y. 353; Fennel *v.* Ridler, 5 B. & C. 406; Bernard *v.* Luepping, 32 Mo. 341; Peltz *v.* Long, 40 Mo. 532; Bloom *v.* Richards, 2 Ohio St. 387.

Amos M. Thayer, for respondents, cited: 52 Mo. 474; 1 Wag. Stat. 504, secs. 32, 35.

GANTT, P. J., delivered the opinion of the court.

This was an action on a contract in the following words and figures:

"*St. Louis, November 24, 1868.*

"We agree to pay Sheffield, Eaton & Stone, publishers St. Louis *Home Journal*, five dollars per issue for publishing a hundred (1-2 column) line advertisement for us in their weekly (Sunday) edition, every Sunday, for one year. Said advertisement to be changed at our option.

"BALMER & WEBER."

At the time this contract was made there were two editions of the *Home Journal*, one dated and issued on Saturday, the other on Sunday. The Saturday edition was struck off on Saturday morning; the Sunday edition on Saturday afternoon, and before 12 o'clock at night. There were separate lists of subscribers. The advertisements in the editions were different. The editorials were the same in both. The local news was different. Some preferred the Sunday edition as an advertising medium, people having more time to read on Sunday. The Sunday edition was delivered on Sunday morning to carriers and newsboys. Office was kept open for this purpose on Sunday. In February, 1869, the two editions were consolidated, and the advertisements sued for were printed in the consolidated edition, dated on Saturday. In April, 1869, defendants desired a change in the advertisement, which not being made, they paid up all that was due for advertising up to that time, and directed discontinuance of the advertisement. The suit is for advertisement since that date; or for the

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sum which would be due under the contract for advertisements, if made pursuant to the contract.

Several instructions were asked by the defendants, three of which assailed the contract as invalid because it contemplated the doing of work on Sunday, and because plaintiff sought to recover for work actually done on Sunday. The fourth asked the court to declare that the plaintiffs could not recover for advertisements published, without defendants' consent, in the Saturday and not in the Sunday edition. All these the court refused.

The court also was asked by plaintiffs to declare that, if the consolidated Saturday edition retained the same columns of local news that was customarily published in the Sunday edition, then the consolidation did not bar plaintiffs' right to recover under the contract.

1. We will not touch the question of this contract being void for the reason that it contemplated work on Sunday, against the prohibition of the statutes of Missouri. The Supreme Court, in 52 Mo. 474, declared that this contract did not, in terms or necessarily, contemplate a violation of the statute, and it is in evidence here that no Sunday edition was published after February, 1869; while all money which could in any event be due under the contract up to April, 1869, has been paid. No question of a violation of the Sunday laws can arise in respect of a paper printed and distributed on Saturday.

2. The defendants stipulated for publication in an edition to be dated and published on Sunday. The plaintiffs disabled themselves from performing the contract to make such publication. At any rate, they did not perform it, and, as we gather from the record, the action is brought for advertisements which the defendants ordered to be discontinued in April, 1869, paying at the time for all that had been made up to the date of the order of discontinuance.

If defendants, knowing of the consolidation, had explicitly or impliedly authorized the insertion of the advertisements

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in the Saturday edition, plaintiffs might recover a reasonable price for such services. But, clearly, this was something very different from what the defendants bargained for. If in April, 1869, defendants ordered the advertisements to be discontinued, for any cause, and paid up all that was due for advertising up to that time, there being no Sunday edition of the *Home Journal* after February, 1869, defendants were not thereafter liable on the contract. This would be still more certainly and plainly the law if defendants were not cognizant of the consolidation, and the discontinuance of the Sunday edition. The judgment of the Circuit Court is reversed and the cause remanded. The other judges concur.

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KATE BURNS, by THOMAS BURNS, her Guardian, Respondent, v. HENRY WILSON, Appellant.

February 14, 1876.

1. Where the aggregate of damages claimed in a petition was $1,200, and part of the claim, stated at $300, was excluded by an instruction, a verdict for $1,200 cannot be sustained.
2. It is erroneous to give an additional instruction to the jury after argument and submission of the cause, unless it appear that the party complaining could not have been prejudiced thereby, or that it was necessary in order to rectify some omission or oversight.
3. The relation of father is not essential to the position of next friend of an infant plaintiff.
4. It is too late to object, in this court, that the jury were sent out of the court-room to hear the arguments of counsel, when it does not appear that any unfairness resulted, or that any objection was offered at the time.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Thomas S. Espy, for appellant, cited: Sec. 9, ch. 110, Practice in Civil Cases, Wag. Stat. 1001; State, to use, v. Matson, 38 Mo. 489; Winston v. Taylor, 28 Mo. 86; Owens v. Hannibal & St. Jo. R. R. Co., 58 Mo. 386;

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Norton *v.* Ittner, 56 Mo. 351; Art. 9, sec. 47, Practice in Civil Cases, Wag. Stat. 1046; McCloskey *v.* City of St. Louis, 50 Mo. 89; Brown *v.* Hannibal & St. Jo. R. R. Co., 37 Mo. 299; Vaughan *v.* Scade, 30 Mo. 600; Scott *et al.* *v.* Russell, 39 Mo. 407; Art. 8, sec. 3, Practice in Civil Cases, Wag. Stat. 1034; Dunn *v.* Raley, 58 Mo. 136; Gibson *v.* Chouteau, Min., 45 Mo. 178; Turner, Exr. of Benoist, *v.* Christy, 50 Mo. 148; Fitzgerald *v.* The State, 14 Mo. 413; Gutzwieler *v.* Lockman, 39 Mo. 100; Bateson *v.* Clark, 37 Mo. 31–34; Mortland *v.* Hatton, 44 Mo. 58; Richardson *v.* George, 34 Mo. 104; Parker *v.* Moore, 29 Mo. 218; Brown *v.* Hannibal & St. Jo. R. R. Co., 37 Mo. 298; Scott *et al.* *v.* Russell, 39 Mo. 410, *ut supra*; Gibson *v.* Chouteau's Heirs, 45 Mo. 173.

Pope & McGinnis and *William Hensley*, for respondent, cited: Dowzelot *v.* Rawlings, 58 Mo. 75; DeGraw *v.* Prior, 53 Mo. 313; Jones *v.* Steele, 36 Mo. 324; Montgomery *v.* Tipton, 1 Mo. 446.

LEWIS, J., delivered the opinion of the court.

Plaintiff, an infant under fourteen years of age, sues for damages by reason of the falling of a marble slab on her foot, at the defendant's marble yard. The petition states that in consequence of the injury "she was forced to incur great trouble and expense to herself, losing the value of her services for a long space of time, and her physician's bills and medical expenses amounting to more than $300," etc. She concludes thus: "Plaintiff alleges that, altogether, she has sustained damages to the amount of at least $1,200, for which she prays judgment."

The court, by an instruction, very properly withdrew from consideration by the jury all claim of compensation for loss of services and for medical or other expenses; yet the verdict was for $1,200. This was $300 more than the plaintiff claimed for the injuries which the jury were authorized to consider. The sum of $300 is distinctly specified in the petition for loss of service, medical expenses,

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etc., as a part of the aggregate of $1,200 for all the damages sustained. When this item was withdrawn there was left the sum of $900, beyond which the jury could not go in estimating the damages for other injuries. There is in this error sufficient ground for reversal.

It appears that, after the argument and submission of the cause, the court, upon request from the jury, gave them an additional instruction, defendant objecting and excepting to that action. By Wagner's Statutes, 1046, section 47, "when the evidence is concluded, and before the case is argued or submitted to the jury, or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing, and shall be given or refused; the court may, of its own motion, give like instructions." The manifest intent of this provision is that counsel may have the benefit of the instructions in their arguments before the jury, and thus avoid resting their cause upon any proposition of law which the court may not sustain. If this be disregarded, the court may, when the argument is concluded, put an entire new face upon the application of the law to the facts. Counsel will then have had no opportunity to illustrate this application in their clients' behalf, as the law evidently intends they should. In *Cluskey* v. *The City of St. Louis*, 50 Mo. 89, the court, after the argument closed, at the instance of defendant, withdrew from the jury, by instruction, a written contract which had been introduced for the defense. Plaintiff having appealed, the Supreme Court refused to reverse on that ground, saying that the withdrawal "could have done the plaintiff no harm. If it had any effect at all, it was in his favor." In *Dowzelot* v. *Rawlings*, 58 Mo. 75, Judge Sherwood said: "There may be instances when it will become the imperative duty of a court to rectify some omission or cure some oversight," by giving to the jury an additional instruction after their retirement. The course pursued in the present case, as exhibited by the record, derives no sanction from either of those decisions. When

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the terms of a statute, even though merely directory, are departed from, the record should show the circumstances which justify it. Here, we have no information of what the instruction was, nor yet of any omission or oversight which made it necessary. The ordinary presumption in favor of a court's action within the sphere of its authority cannot be applied under such circumstances. The defendant, having duly excepted to the giving of the instruction out of its proper order, is entitled to the benefit of his exception here, unless it can be shown either that the proceeding could not have prejudiced his rights, or that it had become necessary in order to avoid a greater evil.

Defendant objects that after the verdict the court permitted the father of plaintiff to qualify, under the statute, as her next friend, and caused the various entries in the record to be amended accordingly. The point made is that no evidence had been offered to show that Thomas Burns was the plaintiff's father, and, therefore, there was nothing to authorize the amendment. If the amendment had substituted Thomas Burns as plaintiff, instead of his daughter, on account of loss of services, etc., there might be some force in the objection. But no such thing was attempted. He was simply admitted as next friend, making himself responsible for costs. The relation of father was not essential to that position, and was not an issuable fact. *Jones* v. *Steele*, 36 Mo. 324.

Complaint is also made that the jury were sent into another room to hear the arguments of counsel, while the court proceeded with other business in the court-room. It does not appear that any unfairness resulted, or that the defendant offered any objection thereto at the time, and it is too late to object now. He was willing to risk that method, coöperated in it, and would doubtless have been very well satisfied if the verdict had been in his favor.

For the errors before mentioned the judgment is reversed and the cause remanded. The other judges concur.

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CHARLES F. CHAMBERLIN *et al.*, Appellants, *v.* SAMUEL PELTZ, Assignee of WATSON & ALLEN, Respondent.

February 14, 1876.

Plaintiffs exchanged certain personal property for land, with the understanding that, for the difference in value between the personalty and the land, they were to receive notes, secured by chattel mortgage upon the personalty exchanged. The value of the land and of the personalty was agreed upon, notes were executed for the difference and secured upon the chattels, and a deed of the land, with warranty, executed and delivered to plaintiffs. It afterwards appeared that taxes to a considerable amount were a lien on the lands at the time of the transfer. *Held*, that plaintiffs, as against creditors of the persons giving the chattel mortgage, were not entitled to an equitable lien upon the goods for the difference between the amount of the notes and the sum for which it is alleged they should have been made had the fact of the unpaid taxes been known to plaintiffs when the transaction was consummated.

APPEAL from St. Louis Circuit Court.

Affirmed.

Hallum & O'Sullivan, for appellant, cited: McKnight *v.* Bright, 2 Mo. 110; Crump *v.* Mosley, 8 Mo. 408; Bledsoe *v.* Gaines, 30 Mo. 448; Marsh *v.* Turner, 4 Mo. 253; Adams *v.* Buchanan, 49 Mo. 64; Haggerty *v.* Palmer, 6 Johns. 437; Knowles *v.* Lord, 4 Whart. (Penn.) 500; Wormly *v.* Lowry, 1 How. Tem. 468; Ingham *v.* Vaden, 3 How. Tem. 51; Harris *v.* Horner, 1 Dev. & B. (N. C.) Eq. 455; Donaldson *v.* Bank of Cape Fear, 1 Dev. (N. C.) Eq. 103; 4 Hen. & M. 113; Tomkins *v.* Mitchel, 2 Rand. (Va.) 428.

Bereman & Smith, for respondents, cited: White & Tudor Ld. Cas. (3d Am. ed.), top page 375; Lupin *v.* Marie, 6 Wend. 99; James *v.* Bird's Admr., 8 Leigh (Va.), 510; Beaw *v.* Blanton *et al.*, 3 Ired. (N. C.) Eq. 51.

BAKEWELL, J., delivered the opinion of the court.

Defendants demur to the petition of plaintiff herein, and for ground of demurrer allege that the petition does not set forth facts sufficient to constitute a cause of action. The court below gave final judgment for defendant on the

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demurrer, and plaintiffs, after motion for new trial overruled, having duly saved exceptions, bring the cause here by appeal, and for error assign the action of the court below in sustaining the demurrer to their petition.

The petition sets forth that plaintiffs, in May, 1873, were in business as job printers and stationers in St. Louis, having on hand a stock valued at $30,877; that said stock was then sold to Watson & Allen for that sum, they to give in part payment certain real estate valued at $22,200, and to pay the balance of $8,677 by the notes of said Watson & Allen, secured by chattel mortgage upon the stock sold; that said Watson & Allen executed and delivered to plaintiffs deeds for the real estate, with warranty against taxes, and also stated to plaintiffs that they had actually paid all taxes then assessed against said land, and also delivered to plaintiffs their notes at sixty and ninety days for the balance of $8,677, secured by chattel mortgage on the property sold, according to agreement; that, shortly after the maturity of the last of said notes, Watson & Allen, being insolvent, made an assignment of their property, consisting principally of that thus bought of plaintiffs, to defendant, Peltz, for the benefit of their creditors; that, after said assignment was made, plaintiffs discovered that there were, at the time of their sale and delivery of the goods in question to Watson & Allen, about $1,025 taxes assessed against, and an unpaid lien against, the real estate which they had received as aforesaid from said Watson & Allen, in part payment of these goods, which taxes they, the plaintiffs, have since paid; that, owing to the false and fraudulent representations of Watson & Allen in regard to these taxes, the notes secured by chattel mortgage upon the property sold to Watson & Allen, and by them assigned to Peltz, were made for $1,025 less than the agreed amount; that Peltz, as assignee, has sold said goods and has the proceeds in his hands; that Watson & Allen, being insolvent, their warranty is worthless, and that, by virtue of the premises, their claim for

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taxes, $1,025, is a preferred claim against the fund in the hands of the assignee, and that said fund should be charged with the same before the general debts of Allen & Watson are paid by the assignee; and they pray that the same be allowed as a preferred claim against said fund, and that the said assignee be ordered to pay the same to them, out of the fund in his hands, as assignee, not otherwise disposed of, and for general relief.

We think the demurrer was properly sustained. It not only does not appear from this petition that plaintiffs did not get notes secured by chattel mortgage upon this personalty for the difference between the value fixed upon the goods and that fixed upon the real estate to be taken in part payment, but it appears affirmatively that they did get such notes in compliance with the agreement and understanding between the parties. The value of the land was agreed upon when the value of the goods was agreed upon; notes were executed for the difference, and these were secured by chattel mortgage upon the goods sold by plaintiffs; and proper deeds with covenants of warranty were executed for the realty. The court is now asked to declare that there is an equitable lien upon these goods for the amount for which it is asserted that these notes would have been made if plaintiffs, at the time of the transaction, had exercised ordinary care and diligence, by ascertaining whether the taxes on these lands were paid at the time the transaction was closed. Perhaps, if the plaintiffs had discovered this fact about the taxes in time, the bargain would have been modified. They chose, without examination, to take the statements of the parties and their covenants contained in their deeds. Courts of equity do not sit to relieve parties who refuse to exercise a reasonable diligence or discretion, and we do not see why plaintiffs should be preferred to the other creditors of these insolvents, nor why they should not now look to the general assets of

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their estate for the damage caused to them by the breach of warranty in their deeds.

Whether, if by fraud or mistake these notes had been made for an amount less than a certain liquidated sum which by agreement was to be secured upon the chattels sold, the plaintiffs would have had an equitable lien upon the proceeds of the sale of these goods in the hands of an assignee for the benefit of creditors of the makers of the notes, it is not necessary for us now to say. It is sufficient that we do not think that any equity appears from the facts as alleged in the petition.

The judgment of the Circuit Court sustaining the demurrer to plaintiffs' petition is affirmed. The other judges concur.

THE STATE OF MISSOURI, to use of PATRICK K. DOYLE, Plaintiff in Error, *v.* ROBERT TOBIN *et al.*, Defendants in Error.

February 14, 1876.

1. Where no exceptions are saved to the rulings of the trial court, and there is evidence to support the verdict, this court will not interfere.
2. Action against a constable for taking plaintiff's property under execution against another. It being manifest from the verdict that the jury found the plaintiff not to be the true owner, he has no right to complain that the judgment and execution were void.

ERROR to St. Louis Circuit Court.

Affirmed.

Morris & Peabody, for plaintiff in error, cited: Higgins *v.* Peltzer, 49 Mo. 152; Wernecke *et al.* *v.* Wood, 48 Mo. 352; Fultmin *v.* Monks, 43 Mo. 502; Coon *v.* Brook, 21 Barb. 546; Griffith *v.* Clark, 18 Md. 457; Howard *v.* Clark *et al.* 43 Mo. 344; State *v.* Shacklett, 37 Mo. 280; Duncan *v.* Spear, 11 Wend. 34; Duncan *v.* Spear, 16 Wend. 562, 571.

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E. C. Kehr, for defendant in error.

BAKEWELL, J., delivered the opinion of the court.

This is a suit on a constable's bond against the constable and his sureties. The breach alleged is that defendant, as constable, wrongfully took into his possession and converted to his own use, without the consent of plaintiff, certain goods, the property of plaintiff, worth $600.

Defendant, in his answer, says that the property in question did not belong to plaintiff, but belonged to S. S. Doyle and M. A. Doyle, and that he took it as constable, by virtue of an execution issued to him on a judgment against said S. S. Doyle and M. A. Doyle. Defendant, also, by leave, files a supplemental answer, in which he states that plaintiff claimed the property as his own, whereupon the constable took and approved an indemnifying bond, whereby, he says, the defendants were discharged.

Plaintiff replies that there is no such person as S. S. Doyle, and that the judgment was really against Moses Doyle and Mary Ann, his wife.

There was a verdict and judgment for defendants.

The court refused all the instructions asked by defendants, and gave both instructions asked by plaintiff, which were to the effect that, if the jury believed from the evidence that Moses Doyle and M. A. Doyle sold the stock of goods in question to plaintiff, for a valuable consideration, and that said goods were owned by plaintiff when taken by the constable, the plaintiff is entitled to recover; even if the jury further believe from the evidence that the sale to Patrick Doyle was made in fraud of creditors, they will find for plaintiff, and assess his damage at the value of the property as proved, not to exceed $600.

The record is very voluminous. The evidence tends to show that Moses Doyle and M. A. Doyle were man and wife, that the wife carried on a millinery store, and contracted a debt for stock in trade, which was paid by eight joint notes of herself and husband for $50 each; that an effort was

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made to obtain judgment against herself and husband before a justice on one of these notes, the judgment being erroneously entered against S. S. Doyle and Mary Ann Doyle, instead of Moses Doyle and Mary Ann Doyle; that, on this execution, the goods of the millinery store were seized by defendant Constable Tobin; that, a few days before the seizure, Moses Doyle and Mary Ann his wife, by bill of sale acknowledged and recorded, sold, or attempted to sell, to Patrick Doyle, the plaintiff, and brother of Moses, the stock in trade for $600. There was evidence tending to show that the stock was worth then not over $100; that this sale was in fraud of creditors, a mere sham, and that no consideration passed. The testimony of Patrick was of such a character that the jury might well disregard it. It appears they did so, and found for the defendant, not believing that any consideration was paid for the goods. We shall not disturb the verdict; indeed, we cannot do so. The appellant cannot complain of the instructions, as they were all he asked; and we see no error committed by the trial court.

The plaintiff insists that the judgment against Mary Ann Doyle and S. S. Doyle, before the justice, was void, and would not support the execution or warrant the constable in his levy. That may be, but if Patrick Doyle had no interest in this property (and the jury has found he had not), what right had he to complain?

The judgment of the Circuit Court is affirmed. The other judges concur.

Frederick A. Witte, Respondent, *v.* Western Mutual Fire Insurance Company, Appellant.

February 14, 1876.

1. When a building containing property insured against fire is used for purposes prohibited by the terms of the policy, and the insurance company,

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upon being notified thereof, declines to fix an increased rate of premium, and afterwards collects its regular assessments on the policy, treating it as a subsisting contract, the condition of forfeiture is waived, and cannot be set up against an action on the policy after the burning of the insured property.

2. When assessments have been collected under such circumstances, all presumptions as to date are, in the absence of proof, against the party collecting. The *onus* is on the insurer to show that the collections were upon assessments made before the alleged act of forfeiture.

APPEAL from St. Louis Circuit Court.

Affirmed, with 10 per cent. damages.

A. R. Taylor, for appellant, cited: St. Louis Fire & Marine Ins. Co. v. Boeckler, 19 Mo. 135.

Edward C. Kehr, for respondent, cited: Reid v. Piedmont & Arlington Life Ins. Co., 58 Mo. 421; Roussin v. St. Louis Perpetual Ins. Co., 15 Mo. 244; Hannibal & St. Jo. R. R. Co. v. Moore, 37 Mo. 338; Knipper v. Bechtner, 32 Mo. 255; Gillett v. Matthews, 45 Mo. 307; Clarke v. Hammerle, 27 Mo. 55; Mead v. Brotherton, 30 Mo. 201; Sawyer v. Hannibal & St. Jo. R. R. Co., 37 Mo. 240; Fitzgerald v. Hayward, 50 Mo. 516; Hayward v. National Ins. Co., 52 Mo. 181–196; Pelkington v. National Ins. Co., 55 Mo. 172; Horwitz v. Equitable Ins. Co., 40 Mo. 557; Franklin v. Atlantic Ins. Co., 42 Mo. 460; Combs v. Hannibal Ins. Co., 43 Mo. 151; Merchants and Manufacturers' Ins. Co. v. Curran, 45 Mo. 142; Sims v. State Ins. Co. of Hannibal, 47 Mo. 54; Northrup v. Mississippi Valley Ins. Co., 47 Mo. 435; Froehlich v. Atlas Life Ins. Co., 406; Hayward v. National Ins. Co., 52 Mo. 181 (195–6); Bonnell v. U. S. Express Co., 45 Mo. 422; Kelly v. U. S. Express Co., 45 Mo. 428; Banister v. Henn, 45 Mo. 567; Shackley v. North Missouri C. & M. Co., 50 Mo. 410; Calhoun v. Crawford, 50 Mo. 458.

LEWIS, J., delivered the opinion of the court.

Plaintiff was assignee of a policy of insurance issued by defendant to Herman Witte, on a stock of hames and material, with engine, boiler, and machinery, in a building

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occupied for the purpose of manufacturing saddle-trees, harness, etc. The premises having been destroyed by fire, suit was brought to recover the insurance money. At special term the plaintiff obtained judgment for $1,961.75, which judgment was affirmed in general term. A condition in the policy provided that if the premises should be appropriated or used for the purpose of "carrying on or exercising therein any trade, business, or vocation denominated hazardous, or extra hazardous, or specified in the memorandum of special rates," etc., or for the purpose of keeping or storing therein any of the articles so denominated or specified, unless agreed to by the defendant, in writing, indorsed upon the policy, then the policy should cease and be of no force or effect. The testimony tended to show that the insured, during the continuance of the policy, used a part of the building for the manufacturing and storing of furniture—an occupation within the denomination "hazardous," and, therefore, violative of the terms of the policy. Also, that on more than one occasion he notified defendant's secretary of this increase of the risk, asking him to fix the proper increased rate of premium accordingly; that the secretary answered, in effect, that "it was all right," and no additional premium was necessary; that, after this notification, one or two assessments on the premium note were paid to, and received by, the secretary without objection.

The only alleged error to which our attention is called by the appellant was in the giving of the following instruction to the jury, viz.:

"Although the jury may find that Herman Witte did, in the spring of 1871, commence to manufacture furniture in the building containing the property insured by this policy, yet if the jury find that he shortly thereafter gave or caused notice of the fact to be given to the defendant, and requested the defendant, if it deemed the fact material to the risk, to fix the increased rate of premium and make the

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proper indorsement upon the policy in suit, then it became the defendant's duty either to fix such rates and make such indorsements, or to notify the holder of said policy of its refusal to do so; and if the jury find that the defendant afterwards, and with knowledge of the fact that furniture was being manufactured in said building, collected its assessments upon said policy, and treated it as a subsisting contract, the jury may find that the defendant waived the condition of forfeiture alleged in the answer, and, in such case, the verdict must be for the plaintiff. If the jury find for the plaintiff, they will allow interest upon the amount due from the 14th day of June, 1872, to the date of the verdict, and add the same to the principal."

The general doctrine of waiver of forfeiture by an officer of the corporation, as applied in this instruction, has been so often announced by our Supreme Court in similar cases that it would be useless further to discuss it here. The present case is made stronger than many of its predecessors by the fact that it appeared, from the testimony of the secretary himself, that he had full authority and discretion to act in the matter of increased rates upon increased hazards, without any consultation with other officers of the company. It is claimed, however, by appellant, that the instruction is faulty in not distinguishing between assessments for liabilities which existed before the forfeiture and those which may have arisen afterwards. A distinction might well be made, doubtless, between the effects, respectively, of the two classes of assessments to operate as waivers in a given state of facts. But in the present case there was no testimony showing whether the assessment liabilities accrued before or after the alleged forfeiture. When the collection after the forfeiture was shown, all the presumptions as to date were against the defendant. The burden, then, lay on the company to prove, if such were the fact, that the liability to pay the assessments was perfected anterior to

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the forfeiture. The instruction, therefore, was without fault in this particular.

Horwitz v. *Equitable Ins. Co.*, 40 Mo. 557; *Franklin* v. *Atlantic Ins. Co.*, 42 Mo. 460; *Combs* v. *Hannibal Ins. Co.*, 43 Mo. 151; *Merchants and Manufacturers' Ins. Co.* v. *Curran*, 45 Mo. 142; *Hayward* v. *National Ins. Co.*, 52 Mo. 181; *Pelkington* v. *National Ins. Co.*, 55 Mo. 172.

The judgment must be affirmed, with 10 per cent. damages. The other judges concur.

JAMES C. EDWARDS and THOMAS F. JANUARY, Respondents, *v.* MISSISSIPPI VALLEY INSURANCE COMPANY, Appellant.

February 14, 1876.

1. Where goods are insured on a "memorandum" or open policy, entries of shipments made on the blank book to which the policy is attached are as if made on the sheet on which the policy is written.
2. The express assent of the insurance company to each such indorsement on the policy is not necessary, where such a consent may be implied by the previous dealings of the parties to the contract.
3. Where the policy required that all shipments must be reported to the office of the company, and, by direction of the agent who procured the insurance, the assured had been in the habit of reporting shipments by mailing a statement of the same in an envelope, post-paid, and properly directed to the office of the company, proof of mailing such a letter, so directed and post-paid, will satisfy the condition; and it is not essential to such effect that the agent should have had authority to waive any requirement of the policy.
4. A sum paid by the assured for salvage, on general average, may properly be included in a verdict against the insurer, under the general averment of loss and damage.

APPEAL from St. Louis Circuit Court.

Affirmed.

Davis, Thoroughman & Warren, for appellant, cited: Widow Berny Donville *v.* Sun Mutual Ins. Co. of N.

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Y., 12 La. An. 259; 1 Pars. on Mar. Ins. 318, *et seq.*; Edwards *v.* St. Louis Perpetual Ins. Co., 7 Mo. 382; New York Ins. Co. *v.* Roberts, 4 Duer (N. Y.), 141; E. Carver Co. *v.* Manufacturing Ins. Co., 6 Gray (Mass.), 214; Hartshorn *v.* S. & L. D. Ins. Co., 15 Gray (Mass.), —; Orient Ins. Co. *v.* Wright, 23 How. 401; Bank of United States *v.* Corcoran, 2 Pet. 121; 3 Kent's Com. (6th ed.) 259, note *d.*

Martin & Lackland, for respondents, cited: Pilkington *v.* National Bank Ins. Co., 55 Mo. 172; Hayward *v.* National Ins. Co., 52 Mo. 181; 1 Pars. on Mar. Ins., 590; 1 Pars. on Mar. Ins. 318, 319, 321. See Kennebec Co. *v.* Ins. Co., 6 Gray (Mass.), 204; Currier *v.* Ins. Co., 53 N. H. 538; Jones *v.* Ins. Co., 55 Mo. 342.

BAKEWELL, J., delivered the opinion of the court.

This action was upon an open policy of insurance, for damages to a lot of horses and mules on the steamer "W. R. Arthur."

The policy was dated at St. Louis, August 5, 1869, delivered by defendant to Benjamin T. Grant, at St. Louis, and covered shipments for himself or on account of others. On October 14, 1869, Grant shipped the horses in question at St. Louis, on account of Goran & Bro., the owners, on board the "Arthur," consigned to them at New Orleans. On October 16, 1869, the vessel struck and began to sink; the horses and mules were got out greatly injured, and were subjected to contribution on account of salvage. Plaintiffs sue as assignees of Goran & Bro. The policy contained the following provision:

"This policy covers all shipments consigned to or made by the insured, assured as his own or the property of others, which he may be instructed to insure by indorsement on bill of lading, by letter, or otherwise, the assured to report all such shipments to this office on his being advised thereof; on such sums, on such property, to and from such places, and aboard such vessels, as shall be speci-

fied by application, and mutually agreed upon and written on said policy."

The petition sets out these facts, and, also, that the shipment was entered in the memorandum book attached to the policy, and Grant immediately notified the defendant of the shipment, in compliance with the terms of the policy, to which defendant assented.

The answer admits the terms of the policy, but puts in issue the fact of the entry in the memorandum book attached, and the fact of notice of such shipment to the company, and, on these grounds, denies insurance.

There was a verdict and judgment for plaintiff for $1,536.22; and, a motion for a new trial being overruled, defendant brings the case here by appeal.

On trial it appeared that the entries on the memorandum book attached to, and forming part of, the policy were as stated in the petition. The entry of shipment was made by Grant's clerk, and in precisely the same manner as all previous shipments under the policy; and, immediately on making the entry, the clerk of Grant inclosed a notice of the shipment, declaring the amount of premium and the destination and description of the property, in an envelope, together with a letter to them, the whole directed to defendant, and at once mailed with a postage stamp attached. This method of notification was shown to be the usual way of notifying defendant of shipments under the policy; had been adopted under the instruction of Stark, insurance broker, who procured this insurance for defendant, and had been used in all previous shipments. Plaintiff also showed loss of the property, adjustment, and payment by Grant & Bro. of $488.86 as their general average.

Defendant showed that their office was on Second and Pine streets, St. Louis; that the president and secretary alone occupied the office at the time of the shipment, and alone received the mail matter, and that they had never

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received any notice of the shipment, nor did they know of it, or of the application, till after loss.

There was evidence that Stark was an agent of defendant, acting as their solicitor and broker; that he brought the policy to Grant and collected all premiums, and that Grant knew Stark alone in the matter, and dealt wholly with him, and was by him instructed not to send notice of shipment to him (Stark), but direct to defendant's office, which was always done.

The court granted the following instructions, at the instance of plaintiff:

1. "If the jury believe from the evidence that, on October 14, 1869, Benjamin T. Grant shipped the horses and mules mentioned in the petition, on board the steamer 'W. R. Arthur,' for and on account of Goran & Brother, and that said Goran & Brother were the owners thereof; that, at the date of said shipments, said Grant made the entry of said shipment as it appears in the book annexed to the policy, and that such was the uniform method of entering shipments in said policy-book, recognized and approved by both parties to the policy; and if they further believe that, at the date of said shipment, said Grant caused a copy of said entry in the policy-book to be delivered to the United States mail, prepaid and addressed to the defendant, and that such was the uniform method of reporting shipments under the policy, at the office of defendant, recognized and approved by both parties thereto, and pursued in respect to the previous shipments under said policy; and if they further believe that, on the morning of October 16, 1869, the steamer 'W. R. Arthur' was wounded and disabled by drifting on a reef of rocks in the river, and that said horses and mules were damaged thereby, and that said Goran & Brother assigned to plaintiffs their claim under said policy, then they should find for plaintiffs."

2. "If the jury find for the plaintiffs, they should assess the actual damage suffered upon the property shipped, by

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reason of the accident, including the amount contributed to general average, and deduct the premium in favor of defendant, and give interest at the rate of 6 per cent. from the date of this suit."

At the instance of defendant, the court gave the following instructions:

1. "The court instructs the jury that notice to W. H. Stark was not notice to the company of the shipment and entries mentioned in the evidence, even if the jury shall believe from the evidence that W. H. Stark was the agent of the company for procuring insurance, and for that purpose alone."

2. "The court instructs the jury that, if they find for the plaintiff, they can only find such damages as were actually sustained by the actual depreciation in the value of the mules and horses, and the actual loss of the horses and mules that were lost to the owner; and that, in estimating such damages, they cannot take into consideration the loss of time and other expenses incurred by said owners; but they can only consider the actual value of the horses and mules lost, and the actual injury to the others occasioned by the accident. This instruction is to be considered together with plaintiff's instruction No. 2."

The defendant asked several instructions which were refused. These were to the effect that mailing notice of the shipments to defendants was not a sufficient compliance with the policy unless the notice was received and assented to by the company; that, if Stark was the agent of the company only for procuring insurance, he had no authority to direct notice to be put in the mail, or to waive any requirement of the policy; and to the further effect that certain facts must be found as conditions precedent to recovery. These are set out in separate instructions, and are as follows:

1. That Stark agreed with Grant for the insurance of the property mentioned to be covered by Grant's policy.

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2. That, on making the shipments and entries in evidence, the sums, voyage, and vessels were specified by application, mutually agreed on by Grant and the company, and written on the policy.

3. That Grant, on making the shipments and entries, notified defendant of the same, and that defendant assented.

To the refusal of these instructions, and the granting of those given plaintiffs, defendant duly excepted.

It is apparent, from what has been said, that the appellant insists:

1. That the shipment should have been indorsed on the policy itself.

2. That both parties must mutually agree to such indorsement.

3. That notification of the shipment had to be made to the company—must have been actually received by them—and that the company must expressly assent to such notification.

1. As to the first requisite, it appears from the evidence that it was sufficiently complied with. The ruled memorandum book on which the shipments were entered was attached to the policy and made part of it. If appellant contends, as he seems to do, that these indorsements must have been made on the identical sheet containing the written and printed policy, the seal of the corporation, and the signature of its officers, he is in error.

This is not required in regard to these memoranda on open policies. They are generally, as in this case, attached for convenience to a blank-book conveniently ruled with proper blanks for the entries; and entries on the book are held to be as if made on the sheet on which the policy is written.

2. It was a condition precedent to recovery in this case that there should be an implied assent on the part of the company to the indorsement made on the policy by Grant. This, we think, was sufficiently shown, and more than this

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was not necessary. An expressed assent of the company was not requisite, because it had been waived by their course of conduct in regard to all previous shipments made by Grant on the same policy. He gave them notice on this occasion precisely as he had done on all previous occasions of shipments, and they assented by silence, precisely as they had always theretofore done. The policy indicated no particular form of assent; but had it done so, even written indorsement of assent would have been waived by a continuous neglect to enforce it on the part of the company. The fact appeared in this case, and the law is settled by repeated decisions in this State. *Pelkington* v. *Ins. Co.*, 55 Mo. 172; *Hayward* v. *Ins. Co.*, 52 Mo. 181.

3. It appeared in evidence that notice of the shipment was, in this instance, given to the company, as it had been on all previous occasions, by mailing to the company a written duplicate of the indorsement on the policy. This mode of notice was adopted by Grant at the direction of Stark, who acted as agent of the company in the matter of procuring this and other insurance. No objection was ever made to it. The policy required that Grant should report all shipments to the office of the company, and we think, under the circumstances, the mailing of a properly directed letter, postpaid, was a compliance with this condition. When a letter is put in the mail, properly stamped and addressed, that is evidence strongly tending to show that the letter was received. The jury must pass upon it. There is no conclusive presumption, not even a legal presumption, that it reaches its destination [1 Greenl. on Ev. 43, sec. 40; *Russell* v. *Buckley*, 4 R. I. 525; 3 Watts (Penn.), 324; *Com.* v. *Jeffries*, 7 Allen (Mass.), 563]; and the evidence of the president and secretary that they received the mail of the company and got no such letter was for the consideration of the jury on the other side. But it was not necessary in this case to show actual receipt of the letter, because this manner of delivering these notices was sanctioned by the custom of the com-

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pany and by the direction of Stark to Grant to adopt it. The safe carriage of the letter, under these circumstances, was at their risk; and if, in fact, neither the president nor the secretary of the company ever got it, it was not the fault of Grant, if he properly addressed, paid, and mailed the letter, as the jury find he did. From what has been said, it appears that we think the law of the case not incorrectly declared by the court below, and that no error was committed in giving or refusing instructions.

It is, however, especially insisted that the court erred in refusing the following instruction asked by defendant:

"The jury are instructed that, if they believe from the evidence that W. H. Stark was only the agent of the company for the purpose of procuring insurances, and for that purpose alone, then said Stark had no authority to direct that notice of shipments and entries should be put in the letter-box, or to waive any condition or requirement of the policy."

But this instruction was properly refused, because, although Stark may have had, and, as far as appears, did have, no authority whatever to waive any condition or requirement of the policy, that not being within the scope of his agency, he might very well, from his knowledge of the established and proved custom of the company, direct Grant to serve these notices by mail, as this was no violation of any condition of the policy, which says nothing whatever as to how there notices shall be delivered; and the fact of such notification from Stark, an agent of the defendant, was a warrant to Grant to send these notices by the mail as he did, and his act was ratified by their subsequent acquiescence in such a mode of notice.

Appellant further objects that the court below erred in admitting, against the objection of defendant, evidence of payment and loss by the insured of $458.86, general average, as to which he says no claim was made in the petition. We should not send the case back for a new trial on this

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account alone. It may well be said that the horses and mules were depreciated in value by this claim of salvage, as well as by physical injury. It came out of them—out of their value; the general averment of loss and damage will cover it, we think. At any rate, it is good enough after verdict.

For these reasons the judgment of the Circuit Court is affirmed. The other judges concur.

MISSOURI LOAN BANK, Defendant in Error, *v.* ISAAC F. GARNER *et al.*, Plaintiffs in Error.

February 14, 1876.

A negotiable note executed by A, B, and C, in favor of D, and by him indorsed for value to the plaintiff before maturity, having been protested for non-payment, A went to the office of plaintiff and declared his readiness to pay his share of the note. The party in charge of the office stated his willingness to receive whatever A might pay, and refer the matter to plaintiff. A thereupon left a check for one-fourth of the note, or thereabouts, with instructions that it was only to be used in case of its being accepted as a satisfaction of A's liability. B did very much the same thing. Plaintiff credited their checks on the note, and sued A and B for the residue. The Circuit Court gave plaintiff judgment for the unpaid balance. *Held*, that this was correct.

ERROR to St. Louis Circuit Court.

Affirmed, with 10 per cent. damages.

Donovan & Conroy, for defendant in error.

Polk & Causey, for plaintiffs in error.

GANTT, P. J., delivered the opinion of the court.

This was an action commenced before a justice of the peace to recover the balance due on a negotiable promissory note for $300, dated May 16, 1868, at ninety days after date, executed by Garner, Crews, and Rucker, in favor of Holmes, and by him indorsed. There was credited on the note the sum of $67.11, paid by Crews on October

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24, 1868, and a like sum on the same day by Garner. In the justice's court, and, on appeal, in the Circuit Court, there was judgment for the plaintiff, which appears to have discounted the paper. At the trial, in the Circuit Court, Crews testified that he was one of the parties who executed the note; that the other parties to the note and Mr. Moody, cashier of plaintiff, were officers of a mining company, to raise money for working which this note was made; that the bank discounted the note; that, soon after the protest, he went to the bank and called for the note, and said to the person at the counter that he wished to pay his share of the note, which was one-fourth; that Moody was liable to the same proportion. The person indicated said he would receive what Crews offered, and submit the matter to Moody. Witness left a check for $77, with the distinct understanding that it was not to be used unless in full satisfaction of witness' share; told the person at the counter to show the check to Moody, and, if the proposal was accepted, to credit it on the note, otherwise to return the check; heard nothing more of the note for a year, when Daubigne presented the note to him for payment; Garner testified in the same manner, as to his payment, and the court refused to declare the law to be that the payment of these two sums discharged Garner and Crews, and gave judgment, apparently, for the balance due against them. In so doing, the court committed no error. There is not, in what appears, the semblance of a defense to the action. The note was a negotiable instrument, and had been negotiated. It was protested for non-payment on August 17, 1868. No payment was made on it until October 24, 1868. At that time there was due on it 4 per cent. damages, and 10 per cent. interest, making a total of $317.80, of which one-fourth was $79.45; but this is of no importance. All the makers of the note were bound for its payment, and each one of them was bound *in solido* to the bank which had discounted it. No agreement

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was made by the bank to discharge any of them on payment of less than the whole of it; still less to discharge any of them on payment of less than one-fourth of what was due on it; and, if any such agreement had been made, it would be difficult to uphold it, unsupported as it is by any consideration. It is enough, however, that no such agreement was made. The respondent asks for affirmance, with 10 per cent. damages. We are of opinion that such is the appropriate judgment in this case, and accordingly affirm the judgment, with damages at the rate of 10 per cent. All the judges concur.

JAMES E. GREEN, Respondent, *v.* THE WILLARD IMPROVED BARREL COMPANY, Appellant.

February 14, 1876.

1. Where a recoupment is pleaded for the purpose of reducing plaintiff's damages for breach of contract, it must appear on the face of the pleading that there is some cross-obligation growing out of the contract, which has been violated by plaintiff.
2. Unliquidated damages, arising on an independent contract, cannot be pleaded as a set-off.
3. A mechanic, hired for the purpose of perfecting certain machinery, and bound to devote his skill and labor to the interest of those for whom the machinery is being worked, is not by that fact under any obligation to abstain from applying for a patent in his own name for such machinery, if otherwise entitled thereto.

Semble, that the question of the validity of a patent cannot be determined collaterally in a State court.

APPEAL from St. Louis Circuit Court.

Affirmed.

W. H. Clopton, for appellant, cited: Empire Tr. Co. *v.* Boggiano, 52 Mo. 296; McAllister *v.* Reed, 8 Wend. 109; King *v.* Paddock, 18 Johns. 141; Wag. Stat. 1016, sec. 13; Floyd *v.* Willey, 1 Mo. 430, 643; Johnson *v.* Steader, 3 Mo. 359; Wag. Stat. 1014, sec. 6; Gordon *v.*

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Bruner, 49 Mo. 573; Adams *v.* Campbell, 10 Mo. 724; Hay *v.* Short, 49 Mo. 139; Dickson *v.* Hall, 14 Pick. (Mass.) 217; Goodyear *v.* Day, 1 Blatchf. 565; Curtis' Law Pat. (4th ed.) 655, sec. 496.

A. J. Quigley, for respondent, cited: Tarwater *v.* Hannibal & St. Jo. R. R. Co., 42 Mo. 193; Empire Tr. Co. *v.* Boggiano, 52 Mo. 294.

BAKEWELL, J., delivered the opinion of the court.

Plaintiff sues defendant, a corporation, for a certain amount due to plaintiff for wages as the hired servant of defendant.

Defendant, in its answer, admits that plaintiff worked for defendant eighty-five days, at the rate of $5 per day, in building and constructing machinery for defendant. The answer then proceeds as follows:

"Defendant, for further and separate answer to the plaintiff's petition, says that the stockholders of plaintiff are, by contract, held and firmly bound, one with the other, to use all their ingenuity and skill in designing, perfecting, and patenting machinery and other devices for the use of defendant, and that defendant, in its corporate capacity, is entitled to use and sell all machinery and devices so designed, made, and patented by any of the members thereof. Defendant further says that M. Seymour, one of its stockholders, in furtherance of the interest of defendant, did originate, invent, design, and construct certain machinery called 'a lister,' for the sole and separate use, and as the property, of defendant; that plaintiff was employed by defendant as the hired servant and mechanic in constructing and perfecting said machinery, which said machinery defendant intended to have patented and reserved for the sole and exclusive use, right, and property of defendant, under the laws of Congress of the United States in such cases made and provided; that the plaintiff well knew that the defendant was preparing to have the said machine patented; that the plaintiff was, by the terms of his contract with defendant, bound to protect the interest of defendant in and about the

subject of his employment, and was, while so employed, bound to devote his skill and diligence to the interest of defendant; but that, while so employed and being instructed by defendant aforesaid, as their servant and mechanic, for said specific purpose of perfecting said machinery, and, with a full knowledge of the fact that defendant intended to obtain a patent as aforesaid, plaintiff fraudulently, and without the knowledge of defendant, and contrary to his said contract of employment with defendant, applied for and obtained a patent from the United States government patent office for the said machine, about which he was employed as aforesaid."

After alleging that plaintiff is insolvent, defendant alleges that, "by reason of said fraud and breach of plaintiff's obligations to defendant, defendant has been damaged in the sum of $1,000, for which sum, less the sum of $425, to wit, for the sum of $575, defendant asks judgment."

On motion of plaintiff, all that part of the answer after the first paragraph, admitting the rendition of services and their value, was stricken out. To this action of the court defendant excepted. On trial, there was a verdict and judgment for plaintiff, and, a motion for a new trial being overruled, the defendant appealed, and assigns for error the action of the court below in striking out these parts of his answer.

If the pleader meant to allege that plaintiff was not the original and first inventor of the discovery for which he obtained a patent, he does not properly tender issue. As to that allegation, Seymour may have been an original inventor in fact, and yet, for more than one reason, plaintiff may, nevertheless, be the original inventor in contemplation of law, and perfectly entitled to his patent. But if plaintiff lawfully got a patent to which he was entitled, or if the invention was not patentable, defendant was not damaged.

To show that defendant was damaged it would be necessary, apparently, to go into the question of the validity of

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plaintiff's patent. It must be made to appear that the alleged invention was patentable, and that plaintiff was not the first and original inventor, and that Seymour was. But it is probable that the question of the validity of a patent cannot be raised, even collaterally, in a State court. Law's Pat. Dig. 229, secs. 11, 12, 14. We do not see in plaintiff's alleged fraudulent procurement of a patent any breach of the contract between plaintiff and defendant, as set up in the answer. It is not said that plaintiff promised defendant not to apply for a patent. He was under the same general obligations not to defraud defendant in this matter which the law imposes upon all citizens. But this obligation was not created or increased by the contract of hiring set out in the answer.

The special defense stricken out is not presented as a matter of set-off arising on an independent contract, as such; being a claim for unliquidated damages, it would be bad. It is pleaded as recoupment, for the purpose of reducing plaintiff's damages, on the ground that he himself has not complied with the cross-obligation arising from the same contract. As we have said, the getting a patent in fraud of defendant was no breach of the contract on which plaintiff counts.

For these reasons the portions of the answer stricken out constitute no defense to plaintiff's action. The record presents no error, and the judgment of the Circuit Court is affirmed. The other judges concur.

GUSTAV MALINCKRODT *et al.*, Appellants, *v.* JEFFERSON MUTUAL FIRE INSURANCE COMPANY, Respondent.

February 14, 1876.

Where an open cargo policy had been issued by an insurance company to A, and A reported a shipment on a named steamboat, which was accordingly entered upon the book annexed to the policy as insured thereby, and

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during the voyage the property was, without necessity, reshipped and lost, *held*, that the insurance company, not assenting to the reshipment, was discharged.

APPEAL from St. Louis Circuit Court

Affirmed.

Everett W. Pattison and *Rudolph Schulenburg*, for appellants, cited: Western Ins. Co. *v.* Cupper, 32 Penn. St. 355; 1 Pars. on Mar. Ins. 321–323; 1 Ph. on Ins. 79–85, sec. 133; Carver *v.* Manufacturing Ins. Co., 6 Gray (Mass.), 214; Harman *v.* Kingston, 3 Camp. N. P. 150; 2 Pars. on Con. 336–369; Hartshorn *v.* Ins. Co., 38 Mo. 238; Donville *v.* Sun Ins. Co., 12 La. An. 260; Protection Ins. Co. *v.* Wilson, 6 Ohio, 553; City Bank *v.* Cutter, 4 Pick. (Mass.) 414; Loring *v.* Gurney, 5 Pick. (Mass.) 16; Bliven *v.* New England Screw Co., 23 How. 42; 1 Duer. on Ins. 195, 196–200; Long *v.* Allen, 2 Park. (N. Y.) Cr. 797; Newman *v.* Cazalet, 2 Park. (N.Y.) Cr. 900; Strong *v.* New York Fire Ins. Co., 11 Johns. 323; Depan *v.* Ocean Ins. Co., 5 Cow. 63; 1 Parks on Ins. 47, 48–101; Gregory *v.* Christio, 1 Park. (N. Y.) Cr. 104; Farquharson *v.* Hunter, 1 Park. (N. Y.) Cr. 105; Ongio *v.* Jennings, 1 Camp. N. P. 505; Tierney *v.* Etherington, 1 Burr. 348; Noble *v.* Kennoway, Doug. 510; Salvador *v.* Hopkins, 3 Burr. 1707; Urquhart *v.* Barnard, 1 Taun. 450; Constable *v.* Noble, 2 Taun. 403; Morgan *v.* Atkyns, 3 Camp. N. P. 200; Lethuther's Case, 2 Salk. 443; Bond *v.* Gonsales, 2 Salk. 445; Warwick *v.* Scott, 4 Camp. N. P. 62; Kingston *v.* Knobbs, 1 Camp. N. P. 508; Gracie *v.* Marine Ins. Co., 8 Cranch. 75; —— Ins. Co. *v.* Catlett, 12 Wheat. 386; Coggshell *v.* American Ins. Co., 3 Wend. 283; Bramhall *v.* Sun Ins. Co., 104 Mass. 510; Caldwell *v.* St. Louis Perpetual Ins. Co., 1 La. An. 85; Dows *v.* Howard Ins. Co., 5 Robt. (N. Y.) 473.

Krum & Madill, for respondent, cited: Ang. on Car. 187; Arnold on Ins. 178, 179; Abb. on Ship. 448, 449; 23 Mo. 553.

GANTT, P. J., delivered the opinion of the court.

The appellants procured from the respondent an open

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cargo policy, dated May 25, 1868, by which respondent agreed to insure for appellants all such shipments to or from St. Louis, on good steamboats or sea vessels, by river, sea, lake, or inland transportation, that should be indorsed on the policy-book annexed to the policy, lost or not lost.

The petition states that on January 29, 1872, a shipment was made to appellants at St. Louis, from New Orleans, Louisiana, on a good steamboat; that it was indorsed on the policy-book, and appellants paid the premium, and that the shipment was totally lost. Wherefore appellants prayed judgment for its value.

The answer of respondent set up that the shipment in question had been entered on the policy-book as shipped on the steamboat 'Howard;' that the same was insured as shipped on the steamboat 'Howard;' that it was not lost on the 'Howard,' but, when that vessel reached Memphis, the cargo was, without necessity and without respondent's knowledge or consent, reshipped onto the steamboat 'Columbiana,' which, in coming to St. Louis, was lost with its cargo.

The appellants replied that the cargo was necessarily reshipped, because of the perils of navigation which compelled the measure, and that the privilege of reshipment was reserved in the bill of lading issued by the 'Howard;' that it was customary to reserve such a privilege at that season of the year, and that this custom was well known to defendant.

The facts shown at the trial were that the goods were shipped on the 'James Howard,' from New Orleans to St. Louis; that the boat, in issuing the bill of lading, reserved the privilege of reshipping; that, on reaching Memphis, the water was low, and the river above Cairo was full of ice; that a delay of two or three weeks was occasioned by these causes, during which the 'Howard' could not have reached St. Louis; that the ice then broke up, and the water rose. The goods were reshipped on a small and not very staunch boat, called the 'Columbiana,' and she was sunk in the latter part of February, and her cargo lost, by the ice she encountered near St. Louis.

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Plaintiff offered evidence to prove a custom to reship cargo, under the circumstances, and to show that the insertion of a clause in the bill of lading authorizing a reshipment was in pursuance of an established custom of the trade. This, at any rate, was the purpose indicated. The evidence offered was excluded by the court. It hardly came up to the purpose indicated. The Circuit Court excluded all evidence of custom to which the defendant was not proved to have acceded. At the close of the case of plaintiffs, defendant asked, and the court gave, an instruction that the plaintiffs could not recover.

1. We must affirm this judgment. There was no justification that defendant was bound by for reshipping the cargo at Memphis. The temporary detention caused by low water and ice was of uncertain duration, and actually continued for two or three weeks. In the case of *Salisbury* v. *The Marine Insurance Company*, 23 Mo. 553, damages to a vessel, the repairs of which would consume twelve days, were the cause of a reshipment of the cargo; but the underwriters were held to be discharged of the risk incurred in the new bottom. The privilege of reshipment was a matter which was provided for the convenience of the 'James Howard.' The risk of the defendant was of the cargo on its voyage from New Orleans to St. Louis in the steamboat 'James Howard.' It did not insure the risk when the 'Columbiana' was made the carrier. It had no notice of the change, and whether the risk was increased or lessened is not material. It was not one against which the defendant assured.

2. The evidence offered was incompetent to affect such a contract as existed between plaintiff and defendant. A very definite agreement was here made to assure a particular risk. The evidence offered was for the purpose of subjecting the defendant to a greatly enlarged and varied hazard. Nothing of a similar kind, to which defendant had ever been a party, was shown, and nothing was shown of a custom on the part of underwriters at St. Louis to sanction the resphip-

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ment which the ship owners of New Orleans reserved to themselves the right to make. It is plain that by no intendment could defendant be regarded as having made the contract of insurance in contemplation of any such practice.

The judgment of the Circuit Court is affirmed; all the judges concurring.

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EZEKIEL SAULSBURY, Plaintiff in Error, v. AUGUSTUS W. ALEXANDER, Defendant in Error.

February 14, 1876.

1. **This court will not review the discretion of the Circuit Court in permitting a bill of exceptions to be signed and filed beyond the time limited by its own rules, if done within the time prescribed by statute.**
2. **Judgment affirmed for failure of the record to show sufficiently the proceedings of which error is alleged.**

ERROR to St. Louis Circuit Court.

Affirmed.

F. J. Bowman, for plaintiff in error.

E. C. Kehr, for defendant in error.

GANTT, P. J., delivered the opinion of the court.

In the spring of 1869 Saulsbury sued Alexander for the balance of an account. Alexander answered, and there was a reply to new matter set up in this answer. At the October term, 1869, the cause was tried, and there was a verdict for plaintiff. Nothing further appears by the record until October 14, 1872, when the court set aside the verdict and ordered a new trial. The next entry is on February 20, 1873, when, the plaintiff not appearing, the case was dismissed for want of prosecution. On February 26, 1873, plaintiff filed a motion to set aside this order, on the ground that "it appears, by the record, the court erred in granting a new trial herein after the decision rendered in said

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cause in the Supreme Court, and said cause was not again triable in this court, but plaintiff was entitled to final judgment therein." The court overruled this motion on March 1, 1873. The plaintiff asked for leave to file a bill of exceptions within ten days, which was granted. The bill was not filed until April 5, 1873. No cause for the delay is shown. The bill was, however, signed and filed at the February term, 1873, the term at which the order of dismissal was made and the motion to set it aside overruled. By this bill the motion appeared, the reason assigned for it, the action of the court thereupon, and plaintiff's exception; but this was all. The judgment of the court at special term was affirmed by the court at general term; and it appears, by the entry of the judgment of affirmance, that at the same time the court overruled a motion by Alexander to strike out the bill of exceptions as not having been filed within the time prescribed by the order of court, nor within the time allowed by its rules of practice. The motion to strike out this bill of exceptions is renewed by Alexander in this court. We will not review the discretion of the court of the first instance in allowing a bill of exceptions to be presented and signed at any time during the term at which occurred the ruling objected to. The statute requires a bill of exceptions to be signed and filed during the term. For the orderly dispatch of business, courts, especially in St. Louis, make rules on this subject which it is in general necessary to comply with. But there is an obvious difference between the obligations of the statute and the rule of court. The one is, as far as courts are concerned, unbending; the other is flexible. The authority which makes the rule can suspend its operation under the special circumstances of a particular case. Matters of this kind are necessarily left to the discretion of the court which tries the cause. This was done by the Supreme Court of Missouri, in the case of *Marshall* v. *The Thames Insurance Company*. This case is reported in 43 Mo. 586. The point

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referred to does not appear in the report, but is to be seen by an inspection of the record.

Having decided to retain the bill of exceptions, we, nevertheless, are unable to see what useful purpose it serves. It discloses, indeed, the fact that the motion to set aside the dismissal was made and overruled, and that it alleges that it appears by the record that something has been done by the Supreme Court which rendered the dismissal improper. We have examined the record and find that nothing of the sort appears; and, of course, there was no error in the refusal of the Circuit Court to set aside the order under such circumstances. The judgment is affirmed. All the judges concur.

NEHEMIAH TUNIS, Respondent, v. GEORGE A. LEUTZE, Appellant.

February 14, 1876.

1. A business transaction between parties who afterwards become partners may be settled in a suit at law, notwithstanding such subsequent partnership. The partnership affairs have no relevancy to such a suit.
2. It is not erroneous to permit a witness to refresh his memory from entries made by himself in the books of one of the parties to the suit.

APPEAL from St. Louis Circuit Court.

Affirmed.

Gottschalk, for appellant, cited: Moriss *v.* Martin, 25 Mo. 360; Pattison *v.* Blanchard, 6 Barb. 537; Case *v.* Brush, 2 Cai. (N. Y.) 293; Niven *v.* Spikeman, 12 Johns. 401; Murray *v.* Bogert, 14 Johns. 318; Halstead *v.* Schmelzeh, 17 Johns. 80; Westerly *v.* Evertson, 1 Wend. 432; Atwater *v.* Fowler, 1 Hall (N. Y.), 180; Gridley *v.* Dole, 4 Comst. (N. Y.) 486; Hissrick *v.* McPherson, 20 Mo. 310; Ang. on Car., secs. 495, 503, and note; 1 Greenl. on Ev., secs. 27–171, 204, 205; Eves *v.* Miller, 19 Barb. 196.

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Daniel T. Potter, for respondent, cited: Pars. on Part. 271, and cases cited.

GANTT, P. J., delivered the opinion of the court.

The petition in this case stated that on December 29, 1864, plaintiff agreed to send to defendant a lot of hoop-poles to be sold and accounted for by him. Plaintiff lived at Wellsville, Missouri; defendant at St. Louis. The petition goes on to state that plaintiff sent to defendant, pursuant to this agreement, 33,000 poles; that they were sold for $1,072.50; that the charges amounted to $203, and that the balance of $869.50 was due to him, for which he asked judgment.

The answer admits the contract; denies that plaintiff sent 33,000 poles; says that defendant cannot state the actual number; denies that he neglected to account for them, and insists that he has made full payment; denies that the poles sent were worth $1,072.50; claims that he paid $250 for freight on them; and, by way of counter-claim, asks judgment for $250 paid for freight, and $750 in money, making $1,000.

Plaintiff denied the matter set up as a counter-claim, which was in the following form:

"N. Tunis to George Leutze, Dr.

1865.

To freight paid on hoop-poles..........	$250.00
To money paid for you at your request...	750.00
	$1,000.00

For which sum, with interest and costs, he asks judgment."

The matter was referred to Mr. Post, who reported that 33,000 poles were sent by plaintiff to the defendant, under the contract; that plaintiff informed defendant of the shipment at the time, and that defendant afterwards admitted the receipt of them; that they were worth in market $796.40, subject to commissions and freight amounting to $244.82, leaving a balance of $548.58, on which he allowed

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interest from June 10, 1865, making $190.17, or a total of $738.75, for which the Circuit Court, confirming his report, gave judgment.

The defendant filed various exceptions to this report. He charged that the referee had admitted illegal evidence; second, that he had excluded legal evidence; third, that the finding was against evidence. These exceptions were expanded into nine subdivisions, and the points urged in argument before us are:

1. That there was a partnership between plaintiff and defendant, until the settlement of the business of which this action was not maintainable. But the contract under which these 33,000 hoop-poles were sent forward was anterior to, and wholly distinct from, a subsequent arrangement by virtue of which the defendant was to furnish plaintiff with money to purchase hoop-poles to be sent to defendant and sold on joint account. There is nothing in this objection.

2. That the plaintiff's books were admitted as evidence. This point is not well taken. A witness referred to entries contained in these books as memoranda made by *himself* at the time. He used them to refresh his memory and was able, *dehors* the memoranda, to state the facts which the memoranda referred to.

3. That interest was improperly allowed; and that the petition did not ask for interest.

This is a mistake. It does ask for "interest, damages, and costs of suit." The petition is, indeed, loosely drawn. It does not state *when* the defendant received the goods, nor when his failure to account for them occurred. The answer is equally vague, or more so, for defendant does not state the number of poles received by him, though he denies that he received 33,000. He says that he "cannot exactly state the amount." The petition, however, alleges a contract dated December 29, 1864, and defendant admits it. The answer further charges for freight paid in 1865, and the evidence shows that the poles were shipped soon after January

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1, 1865. We see no error in this allowance of interest.

4. That too little freight was allowed. The evidence reported by the referee fully disposes of this objection.

5. That defendant was charged with all the poles shipped, without proof that they reached him. We think the fair inference is they did reach him. If not, he was very culpable in not giving notice to the plaintiff at the time—to say nothing of his admissions that they had come to hand.

6. That the referee disregarded the admissions of plaintiff in a former suit that he had only received $2,961 on partnership account.

One of the things which excites surprise in this case is that defendant seeks to set up the alleged troubled and unsettled business which the parties embarked in after the shipping of these 33,000 poles as a reason why plaintiff should not have judgment on this separate matter. But either the subsequent matters, all of which occurred in 1865, are now settled and adjusted, or they are not. If they are, they clearly have no relevancy. We must presume that all proper credits and allowances have been made on both sides. If they have not been settled, no excuse is shown for the delay, and, clearly, this action is not the proper one in which to settle the partnership affairs. But any admission of an unequivocal nature, made by either party at any time, is proper evidence to be weighed by the referee. In this case he refers to and explains the supposed admission, and we will not disturb his report on this ground. The evidence which such an admission furnishes is not unanswerable. Both parties were examined by the referee, and their evidence is reported. The conclusion reached by the referee satisfies us.

7. It is objected that the referee did not specially pass upon the counter-claim of defendant. We think he did do this in substance, and that no one could fail to perceive that such was the intention of the report. The counter-claim of

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defendant is not pleaded in a manner that is to be commended, and the evidence disclosed an attempt to mingle the subsequent business, called a partnership, with the matter of this first contract, in a manner which has very much the appearance of studied confusion. We order the judgment to be affirmed. All the judges concur.

NELSON COLE *et al.*, Plaintiffs in Error, *v.* JOHN F. LONG, Defendant in Error.

February 14, 1876.

1. An instruction which assumes as proved any of the material facts in issue, is properly refused.
2. In an action on a guaranty for a balance due upon lumber sold by plaintiffs to J., who had paid various sums on the account, it was not error to refuse an instruction that the jury might find for plaintiffs "the value of the lumber sold by plaintiffs to J."
3. Where there is a conflict of testimony as to material facts, and the law of the case is properly stated in an instruction, the verdict cannot be disturbed upon an assumption that the jury misconceived the law in a matter not particularly specified in the instruction.

ERROR to St. Louis Circuit Court.

Affirmed.

A. R. Taylor, for plaintiffs in error, cited: Wilde *v.* Haycrott, 2 Duv. (Ky.) 309; Michigan State Bank *v.* Peck, 28 Vt. 200; Rapelye *v.* Bailey, 5 Conn. 438; Hotchkiss *v.* Barnes, 34 Conn. 27; Grant *v.* Redsdale, 2 Har. & J. (Md.) 186; 2 Kent's Com. (12th ed.) 557; 2 Pars. on Con. (5th ed.) 14; Central Savings Bank *v.* Shine, 48 Mo. 456, 467; Boehm *v.* Murphy, 46 Mo. 57.

Daily & Adams, for defendant in error, cited: Thompson *v.* Botts, 8 Mo. 710; Merritt *v.* Given, 34 Mo. 98; Moffat *v.* Conklin, 35 Mo. 455; Crole *v.* Thomas, 17 Mo. 329; Belt *v.* Goode, 31 Mo. 128; Medlin *v.* Brooks, 9 Mo. 106; Otto

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v. Bent, 48 Mo. 23; Williams *v.* Van Meter, 8 Mo. 339; Pond *v.* Wyman, 15 Mo. 175; Rogers *v.* McCune, 19 Mo. 557; State *v.* King, 44 Mo. 238; State *v.* Wissmark, 36 Mo. 592; Rankin *v.* Childs, 9 Mo. 673; Smith *v.* Anthony, 5 Mo. 504; Central Savings Bank *v.* Shine, 48 Mo. 461; Patterson *v.* Camden, 25 Mo. 13; St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121.

LEWIS, J., delivered the opinion of the court.

Suit was commenced before a justice of the peace, on an account, amounting to $168.47, for lumber furnished by plaintiffs to one William Jones, upon an alleged guaranty from defendant, in the following terms:

"*St. Louis, Mo., November 24, 1869.*

"*Messrs. Cole & Glass, lumbermen.*

"GENTLEMEN: I am well acquainted with the bearer, William Jones, who is a good and honest man, and I would be glad to hear you had accommodated him in lumber to the amount of a few hundred dollars, for which I will hold myself responsible.

"Yours truly,

"JOHN F. LONG, 515 Chestnut."

Plaintiff obtained judgment before the justice, from which defendant appealed to the Circuit Court. At special term the defendant obtained judgment, which was afterwards affirmed in general term.

The testimony tended to prove that, upon receipt of defendant's guaranty, the plaintiffs furnished Jones with lumber, from time to time, as stated in the account, to the amount of $750.10, upon which Jones made payments at various times, so as to leave a balance due in the sum sued for. Jones testified that when he first began to get lumber upon defendant's guaranty he informed defendant of the fact. The defendant testified, however, that this was not true; that he had forgotten all about the guaranty, and heard nothing of its acceptance by plaintiffs until after the lumber had been furnished and demand was made upon him

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for payment of the account. Plaintiffs prayed the court to instruct the jury as follows:

"The court instructs the jury that the instrument sued on is a continuing guaranty, and that after its acceptance by plaintiffs, and after defendant, within a reasonable time after said acceptance, had notice thereof, it continued to bind defendant for all lumber sold by plaintiffs to said Jones within the amount limited by the terms of said guaranty, and that the amount sued for is within the terms of said guaranty.

"And if the jury believe that the lumber sued for was sold by plaintiffs to Jones on the faith of said guaranty, and that, within a reasonable time after Jones began to receive lumber from plaintiffs on the faith of said guaranty, the defendant was told thereof by said Jones, and that demand for payment for said lumber was made by plaintiffs, of said Jones, before this suit was brought, and payment was not made, and that Jones was insolvent at the time this suit was brought, then the jury should find for the plaintiffs the value of the lumber sold by plaintiffs to Jones, with interest from the time demand for payment was made by plaintiffs of Jones."

The refusal of this instruction is pointed out to us as the "material error" on which the plaintiffs rely for a reversal. It is insisted that the jury were thereby made to believe that information given to defendant by Jones of the acceptance of the guaranty by plaintiffs was not a sufficient notice in law. If this were unquestionably true, the refusal would still be justified by the objectionable features elsewhere in the instruction. The acceptance by plaintiffs and the notice to defendant appear to be assumed as facts admitted, and, therefore, not in issue. We are told by plaintiffs' counsel that the intention was to state them hypothetically. But the form of expression either does not carry out the intent, or else leaves it to be discovered by speculative inference. Such instructions have no proper place before a jury.

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The instruction is open to further objection, in that it tells the jury they may find for the plaintiffs "the value of the lumber sold by plaintiffs to Jones." This, although not so intended, is open to inference that no account is to be taken of the payments which Jones had already made. When instructions are so carelessly worded, their rejection by the trial court can never furnish a ground for reversal.

The following instruction was given for plaintiffs:

"The court instructs the jury that if they believe from the evidence in this cause that, at the time Jones presented the letter of guaranty of defendant to plaintiffs, the plaintiffs were partners, and were such when this suit was brought, and that plaintiffs, on the faith of said letter of defendant, sold to Jones the lumber sued for, and that, within a reasonable time after said letter of guaranty was presented by Jones to plaintiffs, and was accepted by plaintiffs, the defendant had notice of the acceptance of the guaranty by plaintiffs, and that, before this suit was brought, plaintiffs demanded payment of Jones for said lumber, and payment thereof was not made, and that Jones was insolvent at the time this suit was brought, then the jury should find for the plaintiffs the value of the lumber so sold by plaintiffs to said Jones and not paid for, with interest at six per cent. per annum from the time that demand of payment was made, not exceeding the amount sued for, with interest."

This instruction contained all the law of the case upon which plaintiffs could claim a right to recover. There was a direct conflict between the defendant and Jones on the fact of notice; and it is more reasonable to suppose that the jury accepted the defendant's statement as true, than that they were misled concerning the supposed insufficiency of the information given by Jones to constitute a legal notice to the defendant.

Upon the whole we can find no error in the rulings of the Circuit Court. The other judges concurring, the judgment is affirmed.

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THE STATE OF MISSOURI, to use of JOHN GANNETT *et al.*, Respondent, *v.* ANDREW JOHNSON *et al.*, Appellants.

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February 14, 1876.

1. After bond given by the defendant, under "An act concerning the duties of sheriff and marshal," etc., approved March 8, 1855, the notice of plaintiff's claim cannot be objected to for insufficiency.
2. Testimony to show that a purchaser of personal property had ample means to make the purchase may be wholly unnecessary in the absence of any attempt to show the contrary. But its admission cannot prejudice the rights of the opposite party, and will not be error.

APPEAL from St. Louis Circuit Court.

Affirmed.

M. L. Gray, for appellants, cited; 1 Greenl. on Ev. 440, and notes; Young *v.* McClure, 2 Watts & S. (Penn.) 147; Carpenter *v.* Mayer, 5 Watts (Penn.), 485; Hanly *v.* St. Louis Butchers, 39 Mo. 217; Barr *v.* Reiley, 53 Tenn. 285; Walters *v.* Cralls, 8 B. Mon. (Ky.) 11; Chase *v.* Ralston, 30 Penn. St. 541; Claflin *et al. v.* Rosenburg, 42 Mo. 439.

R. E. Rombauer, for respondent, cited: Van Sant. Pl. 239, 258; McMurry & Thomas *v.* Gifford, 5 How. (N. Y.) Pr. 15; Iron *v.* Childs, 28 Mo. 576; State, to use, *v.* Watson, 30 Mo. 122; Hill *v.* Sturgeon, 28 Mo. 323, 329; Hamilton *v.* Scull, Admr., 25 Mo. 165; State, to use, *v.* King, 45 Mo. 238, 240, 241; Bay *v.* Sullivan, 30 Mo. 191; Gonsolis *v.* Gearhart, 31 Mo. 585; McKay & Wood *v.* Underwood, 47 Mo. 185.

LEWIS, J., delivered the opinion of the court.

This is an action upon an indemnifying bond, under "An act concerning the duties of sheriff and marshal, etc.," approved March 3, 1855, given by defendants on account of an execution levy upon a piano as the property of John T. Fiala, which was claimed by the usee of the plaintiff. Plaintiff recovered judgment in the court below.

Defendants objected, on the trial, to the notice of plaintiff's claim, as served upon the officer, for insufficiency. The

notice does not appear in the bill of exceptions; so that we are unable to pass upon it. At all events, the objection stated could not be raised after the bond was given. *State, use of Goldsall*, v. *Watson*, 30 Mo. 122.

The testimony tended to prove that Fiala, who formerly owned the piano, went to California, from St. Louis, in October, 1871, leaving with his wife full authority to sell or dispose of any of his personalty, but not with reference to any apprehended claims of creditors, by execution or otherwise; that Miss Mackey, who has since intermarried with John Gannett, the plaintiff's usee, boarded with his family, and, on February 2, 1872, purchased the piano from Mrs. Fiala, for cash paid, at the price of $300, having no knowledge, at the time, of any judgments or executions existing or anticipated against Fiala; that the defendants obtained a judgment on the 6th, and caused the piano to be levied upon on the 28th, of the same month; that, from the time of Miss Mackey's purchase until the levy, the piano remained in the dining-room, where it had usually stood, and was there used by different members of the family, Miss Mackey being part of the time confined to her room by sickness.

Objection was made by defendant to the testimony of George W Smith, which tended to show that Miss Mackey possessed ample means to make the purchase. This testimony may have been unnecessary, in the absence of any attempt by defendants to impeach the lady's purchasing capacity, but we cannot see how it could possibly prejudice the defendants' rights, or furnish any ground of error.

Herman Block, not a dealer in pianos, testified touching the value of the instrument. This, the defendants insist, was erroneous because the witness was not an expert. No rule requires any special qualification of an expert to estimate the value of household articles in common use. In this case, however, the jury placed the value considerably below that stated by Block, and appear to have accepted

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the defendant's own estimate of $300, as stated in their bond. Hence no wrong was done them in this particular.

At the instance of plaintiff, the court gave an instruction as follows, viz.:

"The jury are instructed that it is for them to determine from the evidence whether the sale of the piano to J. Isabella Mackey was accompanied by a delivery in a reasonable time, and followed by actual and continued change of possession; and that, in determining these facts, the jury must take into consideration the situation of the property."

There was no error in this instruction. It closely adheres to the spirit of the statute, and adopts its language as nearly as that may be applied to the case in hand. Wag. Stat. 281, sec. 10. *State, use of Heed,* v. *King*, 44 Mo. 238.

Upon the prayer of defendants, the court instructed as follows:

"Unless the jury are satisfied from the evidence that Miss Mackey took and had actual possession of the piano in question; that the change of possession was visible, continuous, and exclusive as against John T. Fiala and his family—such a change as to indicate to persons visiting his house and family that said Fiala and his family had no longer control of said piano—they are instructed by the court that, as against creditors, the said sale was fraudulent and void, even though they believe from the evidence that said sale from Fiala to Miss Mackey was in good faith and for a valuable consideration. And, if they further believe that Johnson and Sawyer were creditors of said Fiala at the date of said sale, the jury will find for the defendants."

This, to say the least, contained every legal element that could be advanced in favor of the defendants. It might, in my opinion, have been pruned no little, without excision of any of their legal rights. Other instructions asked for by defendants were properly refused. These ignored all reference to the situation of the property, as affecting the question of reasonable time for the delivery, and assumed that,

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in order to the validity of the sale, the piano should have been instantly removed from its former position, and placed, in effect, beyond access by the members of Fiala's family. The law contemplates no such hasty repudiation of the amenities of the household, for any purpose. At all events, it admits a possibility of their preservation consistently with good faith in the transaction. Appellants insist that there was no evidence whatever of an "actual, visible, and continuous change of possession." This may be true; but the jury may have found, nevertheless, that, between Miss Mackey's purchase and the levy, a reasonable time for such change had not elapsed, regard being had to the situation of the property.

We find in the record no error of which the appellants can justly complain. The other judges concurring, the judgment is affirmed.

Martrom D. Lewis, Public Administrator, etc., Respondent, *v.* G. Weisenham, Appellant.

February 14, 1876.

In a suit by the administrator of an indorsee against the indorser of a promissory note, the latter will not be allowed to testify in his own behalf that he never received notice of protest.

Appeal from St. Louis Circuit Court.

Affirmed.

Henry N. Hart, for appellant.

T. G. C. Davis, for respondent, cited: Wag. Stat. 1372, sec. 1; Stanton *v.* Ryan, 41 Mo. 510.

Lewis, J., delivered the opinion of the court.

Jesse Evans, the plaintiff's intestate, obtained judgment before a justice of the peace against the defendant as indorser of a promissory note. Pending defendant's appeal

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to the Circuit Court, and before the trial, Evans died. At the trial, after the introduction by plaintiff of the customary notarial proofs of protest and notice, the defendant offered to testify in his own behalf, to the effect that he had never received notice of the protest. Upon plaintiff's objection, the court excluded the testimony. This ruling presents the only question in the record for our consideration.

The statute is too plain to be misunderstood. "In actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor." Wag. Stat. 1372, sec. 1.

Appellant's counsel argues that this provision should not exclude the defendant's testimony when offered for the purpose merely of contradicting the notary's certificate. But we are allowed no discretion on account of the purpose for which the testimony may be offered. The test is applied to the parties only. Evans and the defendant were the "original parties to the cause of action in issue and on trial." The notary was a mere agent, and not a party. Evans was dead at the time of the trial, and, therefore, the defendant could not be admitted to testify in his own favor. *Stanton* v. *Ryan*, 41 Mo. 510. The other judges concurring, the judgment is affirmed.

MERCHANTS AND MANUFACTURERS' INSURANCE COMPANY, Appellant, *v.* MICHAEL MAGUIRE, Respondent.

February 14, 1876.

The defendant effected an insurance on his property in the sum of $800, for a premium of $80, for which he gave his note. Afterwards he procured an insurance on other property amounting to $700, and procured a change of his policy, making it cover $1,500. Upon effecting the insurance originally

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he paid 10 per cent. in cash of the note for $80, and on effecting the increase he paid 10 per cent. of the additional $70. The agent of the company made the change of the policy at the request of defendant, received the $7, and changed the note from $80 to $150. Defendant testified that he authorized the change of the policy, but did not authorize the change of the note, though he did not forbid it. Suit was brought on the note for $150. *Held*, that defendant was estopped to deny the agent's authority to change it when he changed the policy.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Joseph T. Tatum, for appellant, cited: Washington Mutual Ins. Co. *v.* St. Mary's Seminary, 52 Mo. 491; 2 Pars. on Notes & Bills, 565; Hunt *v.* Adams, 6 Mass. 519; Bowers *v.* Jewell, 2 N. H. 543; 12 Am. Law Reg. 627.

Thomas Grace, for respondent, cited: Woey *v.* Michael, 33 Mo. 398; Owings *v.* Arnot, 33 Mo. 406; Presburg *v.* Michael, 33 Mo. 524.

GANTT, P. J., delivered the opinion of the court.

Maguire effected an insurance on his property with the plaintiff, in the sum of $800, giving therefor, by way of premium, his note for $80. Subsequently desiring to include other property, and to have the amount insured increased to $1,500, he authorized the solicitor of the company to change the policy accordingly. The solicitor thereupon increased the sum insured to $1,500, and the premium note to $150, and returned the policy so altered to defendant. The defendant, when giving his note originally for $80, the amount of the premium, or just 10 per cent. of the sum insured, paid, as the first call thereon, $8, or 10 per cent. When the alteration was made he paid an additional sum of $7. He testified at the trial that he authorized the alteration of the policy, but not the alteration of the note.

The court gave the following instruction, at the request of the defendant:

"If the note originally executed by defendant, after the instrument was made complete and the blanks filled up for the sum of $80, was afterwards altered by plaintiff,

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in any material point, without the consent or knowledge of defendant, such alterations rendered the note invalid."

And refused the following, asked by plaintiff:

"The agents of the plaintiff were authorized to change the amount of the note on which the suit is brought, so as to correspond with the additional insurance, if the defendant and the plaintiff's agent agreed that the additional insurance should be secured by the original policy for which the original note was given."

Exceptions were duly saved by the plaintiff, who became nonsuit with leave, etc., and, after moving to set the nonsuit aside, the plaintiff appealed to this court.

We think the court erred. This is not the ordinary case of an alteration of an instrument by the person to be benefited by the alteration. By consenting to the alteration of the policy, the defendant at the same time, and necessarily, consented to the alteration of the premium note. It was in evidence that 10 per cent. of the premium note was payable when the insurance was effected. What did the defendant understand when he paid $7 when the amount insured was increased by $700? Certainly that, if his instructions had been obeyed, his additional premium note was $70. It will not answer to say that he accepted the agency of the solicitor so far as it benefited him, but rejected it so far as it imposed on him the correlative obligation. Upon the facts disclosed by the record, we think the instruction refused should have been given, and the instruction given should have been refused. We therefore reverse the judgment and remand the cause. All the judges concur.

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The State, *ex rel.* George Schierberg, Relator, *v.* John Green *et al.*, Respondents.

February 14, 1876.

The functions of this court, under the Constitution, are mainly those of an appellate tribunal, and it will discourage the presentation to it of petitions asking for a remedial writ in cases which may involve the trial of an issue of fact.

Application for *mandamus.*

Writ denied, with leave to relator to withdraw application from the files.

Foster & Meier, for relator.

Bakewell, J., delivered the opinion of the court.

The relator filed a petition in this court, in which he sets forth that respondents, together with Ferdinand Meyer, are commissioners for Exchange Square, in the city of St. Louis; that, by virtue of certain acts of the Legislature and ordinances of the city of St. Louis, set out by their title in the petition, John G. Joyce was, on June 26, 1875, superintendent of public parks of said city, and was empowered, with the approval of the local board of commissioners, to appoint one proper person as keeper of Exchange Square, and did, in due form of law, appoint the relator keeper of Exchange Square, at a salary of $1.75 per day; that relator served in that capacity from July 15, 1875, to November 30, 1875; that, in accordance with the ordinance in that behalf, said Joyce signed a pay-roll certifying that relator had worked, as aforesaid, fifteen days, and was entitled therefor to a compensation of $26.25; that Ferdinand Meyer, being satisfied that said pay-roll was correct, signed the same as by ordinance, as such commissioner, he was bound to do; but that respondents, although said pay-roll is correct, unlawfully refused, and still refuse, to certify the same; that without such certificate the auditor of the city of St. Louis refuses to issue a warrant upon the treasurer of said city for said sum of $26.25 in favor of relator, and that

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when such certificate is duly signed said auditor will issue his warrant on said treasurer in favor of relator for said sum. Relator prays an order from this court commanding respondents to perform their duty, by certifying said pay-roll according to law.

The petition is very lengthy, and sets out by their title many acts of the Legislature and ordinances of the city of St. Louis. We have stated enough to show its general object, and we express no opinion on the merits of the application.

This court has power to issue writs of *habeas corpus*, *quo warranto*, *certiorari*, *mandamus*, and other original remediable writs, and to hear and determine the same, and has a superintending control over all inferior courts of record in the counties of St. Louis, St. Charles, Lincoln, and Warren; but it is plain that its functions under the Constitution are mainly those of an appellate tribunal. It is furnished with no machinery for trying an issue of fact which might be joined in a proceeding such as this; its duties as an appellate court are onerous, and fully occupy the whole time of all its judges. Though in session since its creation but six weeks, more than three hundred cases remain undetermined on its docket, and nothing but the utmost diligence on the part of its judges will enable it so to keep up with its necessary work as to prevent an unreasonable delay of justice to suitors in the counties over which its jurisdiction extends. It is the duty of this court, therefore, to discourage the presentation of petitions asking for a remedial writ in a case of this character. The application should be made to the Circuit Court, which is mainly a court of original jurisdiction, and only incidentally a court of appeals, rather than to a tribunal whose jurisdiction is essentially appellate, and original only under circumstances of a peculiar character, and which is provided with no convenient means of trying an issue of fact.

On grounds substantially the same as those set forth

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above, the Supreme Court (*State* ex rel. *v. Stewart* 32 Mo. 379) refused an application for leave to file an information in the nature of a *quo warranto*. The same public interest then alleged to be promoted by a refusal to allow the filing of the information requires that the present application should be denied by us. But, by denying the application, we by no means deprive the petitioner of his remedy, which he may seek in another forum. The relator will have leave to withdraw his petition from the files of this court. The other judges concur.

MARGARET D. RUSSUM, Respondent, *v.* ST. LOUIS MUTUAL LIFE INSURANCE COMPANY, Appellant.

February 28, 1876.

1. A policy of life insurance, dated December 2, 1868, declared the life of A to be insured in the sum of $10,000, in favor of plaintiff, in consideration of a sum then paid, and a like sum to be paid annually thereafter for nine years. This policy was subject to two conditions: 1. That if default were made in the payment of any annual premium thereafter accruing, such default should not avoid the policy, but the sum insured should be proportionally reduced. 2. That if assured should fail to pay annually, in advance, the interest on any unpaid notes or loans, owing on account of the premiums, then the policy should be void. Part of two premiums was paid in cash, and a note given for the remainder. No payment was made of the premium accruing in 1870, and no interest on the note given; but a dividend was declared more than sufficient to pay the interest. In 1871 no payment was made, and no dividend declared, and in July, 1872, A died. *Held*, 1. The payment of the first premium in full, or of the two first premiums in full, would have given to the insured a full-paid policy corresponding in value to the amount paid; and the payment of part of these premiums in cash, and the payment, in accordance with the terms of the policy, of the interest on the notes taken for the unpaid portion, would have the same effect. But the failure to pay the interest avoided the policy altogether. 2. When, on December 2, 1870, assured failed to pay interest on his note, it was the duty of the defendant to apply to that interest any money in its hands standing to his credit. The balance of any such money was applicable to the reduction of the principal of the note. When interest became again due on the balance of the note, and

remained unpaid, the policy was forfeited. 3. The two provisions of the policy are not inconsistent or contradictory. They may stand together, and it is the duty of a court to give effect to both of them.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Cline, Jamison & Day, for appellant, cited: Patch v. Phœnix Life Ins. Co., 44 Vt. 481; Pitt v. Berkshire Life Ins. Co., 100 Mass. 500; Bliss on Ins. (2d ed.) 284–298, secs. 182–188; Baker v. Union Mutual Life Ins. Co., 43 N. Y. 283; Abb. Pr. 142.

Martin & Lackland, for respondent, cited: Metcalf on Con. 221; Gee v. Cheshire County M—— Ins. Co., 14 Am. Law Rep. 706; Manhattan Life Ins. Co. v. Warrick, Ins. L. J., Oct. 1871; *s. c.*, Gratt (Va.), 614; St. Louis Mutual Life Ins. Co. v. Grigsby, 18 Bush (Ky.), 310; Dutcher v. Brooklyn Life Ins. Co., 4 Big. 665; Ohde v. North Western Life Ins. Co., Ins. L. J., Sept. 1873, p. 702; Story Eq. Jur. 1314, 1316; Froelich v. Atlas Life Ins. Co., 47 Mo. 406; Robert v. Ins. Co., 2 Disney (Ohio), 100; McMaster v. Ins. Co., 3 Ins. L. J. 273, N. Y. Ct. App.

Farish & Griffin & Scott, for respondent, cited: May on Ins. 182; Waterfall v. Hudson, 2 Duer (N. Y.), 495; Pelly v. Royal Express Assn., 1 Burr. 341; Bayless v. Ringer, 7 Carr, 691; Hake v. Eddy, 15 Wend. 80; 2 Pars. on Con. 147; Paffy v. Greenwold, 2 Per. & Dav. 365; Hollins v. Palmer, 2 Bing. N. C. 466; Watkins v. Morgan, 6 Carr, 661; Grigsby v. St. Louis Mutual Life Ins. Co., C. L. J., Feb. 19, 1875, p. 123; McAlister v. New England Mutual Ins. Co., 101 Mass. 560; Mutual Benefit Life Ins. Co. v. French, 2 Bin. S. C. 321; Pars. on Con. 141, *et seq.*, and authorities cited, 143; 3 Abb. Dig. 99.

GANTT, P. J., delivered the opinion of the court.

This was an action on a policy of insurance dated December 2, 1868. By it the defendant, in consideration of $1,066.80 then paid, and of the annual premium of $1,066.80

to be paid on December 2d for nine succeeding years, insured, in favor of the plaintiff, the life of William D. Russum in the sum of $10,000. This policy was subject to two provisos. First, that if default was made in the payment of any annual premium thereafter becoming payable, such default should not work a forfeiture of the policy, but the sum assured should be proportionally reduced. Thus, if only the first annual premium should be paid, then, in case of death, only one-tenth of the sum insured should be claimable. If two premiums only were paid, then two-tenths of the sum insured should be claimable, and so on.

The second proviso was a qualification of the first. It provided that, "if the insured shall fail to pay annually in advance the interest on any unpaid notes or loans which may be owing on account of the above-mentioned annual premiums, at the office of the company in St. Louis, or to agents when they produce receipts signed by the president or secretary, then and in every such case the said company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall cease and determine."

When the policy was taken out (it was effected by William D. Russum for the benefit of his wife) he paid the sum of $711.80, being two-thirds of $1,066.80, in cash, and also the interest, in advance, for one year on the remaining third, being $355, making a cash payment on that day of $733.10. He gave his note at one year for this balance of $355. On December 2, 1869, he paid the further sum of $711.80 in cash; received on the policy a dividend of $129.89; gave a note for the remaining third of the second payment and for the unpaid balance of the old note, making the new note $580.11; and also paid in advance the interest on this note for one year. On December 2, 1870, he failed to make any payment, but a dividend was declared on his policy for that year of $129.89. In 1871 no dividend was earned, and in July, 1872, Mr. Russum died.

1. If he had paid the interest on his note on December

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2, 1871, he would, we think, have been entitled to recover two-tenths of the sum insured, deducting the unpaid note. Having failed to make that payment, the policy is forfeited and the company discharged.

When, on December 2, 1870, he failed to pay the interest on his note for $580.11 then maturing, there was to his credit in the hands of the company $129.89. This sum the company was bound to apply, first, in such manner as to save the forfeiture—that is, to the payment in advance of the interest on this note. The balance was applicable to the reduction of the principal of the note. This left more than $480 of the principal of the note unpaid. When, on December 2, 1871, he failed to pay, in advance, the interest on this unpaid note, he incurred the forfeiture provided in the policy.

We think it impossible to escape this conclusion. It seems a harsh one, but we are of opinion that it is precisely what the parties contracted for, and we have no choice. It avails nothing to remark that the plaintiff would have been benefited by the failure of Mr. Russum to pay any part of the second premium. He actually paid more than the first premium, and if he had paid that first premium only, leaving no note in respect of the non-payment of interest on which a forfeiture might be exacted, the plaintiff would have had the right to recover one-tenth of the whole sum insured. But, again, if he had paid the several premiums as they became due, he would, by paying very little more than $4,000, have entitled the insured to receive $10,000; his family would then have gained $6,000. As matters stand, they lose $1,479.61 with interest. This loss is plainly chargeable on his negligence, and we are powerless to relieve his family from the consequences.

We have been referred to numerous cases by the counsel on both sides of this interesting case. If we do not refer to them here, it is not because we have not read them care-

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fully. Except in a case where particular words or phrases have received, at the hands of the Supreme Court of Missouri, a construction which disposes of a case coming before us, we are compelled, by the best judgment we can exercise, to ascertain the true intent and meaning of every contract we are called upon to expound, by applying to it the accepted rules of interpretation. This we have done in the case before us, but we do not think it necessary to collate the various cases which illustrate these rules.

It is urged that the two provisions of this policy are inconsistent and contradictory, and it is claimed that, if they are, that which leads to a forfeiture must be rejected.

We would accept the conclusion if we considered the premises established, but we do not so consider. The clauses are not inconsistent; they can both stand together, and we may give full effect to both. All that is needed for this is for the insured to bring himself within the terms of both. The first is intended to save a forfeiture which generally would be incurred by the failure to pay the annual premium. To this extent it is a privilege or advantage to the assured. The second proviso insists upon rigorous conditions—in respect of what? Only of so much of any unpaid premuim as the assured, instead of paying in cash, takes the indulgence of only paying interest on, at 6 per cent. If he does not wish to incur the hazard of a forfeiture on account of this part of the premium, his remedy is easy; he can presently pay his note for the premium, and, without more, he has a paid-up, non-forfeitable policy for a fixed portion of the sum contemplated by the instrument when originally issued. If he wishes, instead of this, to take the chances of gain, he must at the same time incur the hazard of loss, and cannot complain if he be held to the terms of the contract he has deliberately made.

From the resolution announced above to state our own opinion in the decision of causes, but not to incumber the

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record with a criticism of the various authorities cited by counsel on either side, we make on this occasion a departure, in order to exclude the conclusion that we have been unmindful of the opinion of the Supreme Court of Kentucky upon the very point presented by the record. In the case of the *St. Louis Life Insurance Company* v. *Grisby*, 10 Bush (Ky.), 310, that very able and learned court made a decision which is directly opposed to this. The respect which we entertain for the decisions of that court has led us to examine the opinion of Judge Lindsay, who spoke for that tribunal on the occasion referred to, with great care. We are unable to concur with it. We consider that it virtually makes a thing, which the parties to the contract declare to be of vital importance, of no significance whatever. The regular and prompt payment of interest on the unpaid premiums of a policy is, of course, essential to the system of allowing them to remain unpaid at all. If the prompt and punctual payment of such interest in advance be not secured in a perfectly reliable way, the alternative will be that no credit can be given. The condition of giving credit for an unpaid premium is a feature of the mutual system of insurance, and it is certainly one of the features which promotes the popularity of the system; but if those to whom credit is given are at liberty to abuse it, the system itself must come to an end. The punctual performance of the contract on which credit is given is vital to the business of the appellant, and every policy-holder is interested in the enforcement of such performance. We have not shut our eyes to the seeming harshness of the application of these rules in the present case, but we see in that hardship no reason for relieving a party from the consequences of a reasonable and unambiguous contract, the benefits of which he has lost by sheer negligence. It is not our purpose to criticise the opinion of the Supreme Court of Kentucky further than to declare that we cannot accept it as a correct interpretation of the instrument which is the foundation of this action. We

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regret this inability, but are compelled to expound that instrument according to what we consider the very clearly expressed intention of the parties to it. All the judges concur in reversing this judgment and remanding the cause.

WEST RICHARDSON, Plaintiff in Error, *v.* HENRY SHAW, Defendant in Error.

February 28, 1876.

Under a contract for building, the payments to be made in installments, as certain parts of the work are finished, if the structure, while in progress, be destroyed by inevitable accident, the builder is entitled to be paid such installments as are fully earned; but he has no claim for a proportional part of the next installment, partially earned.

ERROR to St. Louis Circuit Court.

Reversed and remanded.

Farish & Griffin, for plaintiff in error, cited: Add. on Con. 450, 449; Niblo *v.* Bensse, 44 Barb. 57, and authorities cited; Schwartz *v.* Deagling, 55 Ill. 345.

Glover & Shepley, for defendant in error, cited: Adams *v.* Nichols, 19 Pick. (Mass.) 275; Davis *v.* Smith, 15 Mo. 467; Trippe *v.* Armetage, 5 M. & W. 699; Bunsley *v.* Smith, 3 Ala. 123.

LEWIS, J., delivered the opinion of the court.

On February 9, 1872, plaintiff contracted to furnish the materials, and build for defendant, on land belonging to the latter, a wooden-framed house, for the sum of $5,102, to be paid as follows: $1,000 when the framework should be up; $1,000 when the building should be inclosed; $1,000 when it should be ready for the plasterer, and the balance, $2,102, when the work should be finished. The frame work was up, and the building nearly inclosed, when a violent storm prostrated and destroyed the structure. Afterwards, on May 14, 1872, the parties

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entered into a new contract for the carpenter's work upon a brick building to be erected in place of the other. This contract contained a stipulation as follows: "It being understood and agreed by the parties hereto that one thousand dollars of the last payment of twenty-five hundred dollars has been advanced and paid on a former contract, which said contract is hereby set aside and no longer binding on either of the parties hereto, and that said payment of one thousand dollars will apply on this contract and will form a part of the last payment on the same."

This suit was instituted to recover the sum of $1,426.32, claimed by plaintiff for work and materials furnished upon the first building, up to the time of its demolition. Plaintiff prayed the court to instruct the jury as follows:

1. "If the jury believe from the evidence that plaintiff did the work sued for in this case, under a contract with defendant, and the building was destroyed, before completion, by inevitable accident, without the fault of plaintiff, and that plaintiff complied with his contract except so far as prevented by such accident, they will find for the plaintiff the reasonable value of the work done, not to exceed the contract price; unless they further believe from the evidence that plaintiff released defendant from all liability to him under said contract, and from all obligation to pay plaintiff for said work."

2. "If the jury believe from the evidence that the building in question was being erected by plaintiff in a workmanlike and skillful manner, and that during the progress of its erection it was destroyed by a heavy wind, against which, by the use of proper precaution, the plaintiff could not have protected it, then the fact of the destruction of such building is no bar to a recovery by plaintiff herein, if he is otherwise entitled to recover in this action."

3. "The jury are instructed that it is the duty of a contractor for the erection of a building to protect his work, in all reasonable modes, so as to preserve it from accident;

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and that, if he proceeds with his work in a workmanlike and skillful manner, and according to contract, and uses all reasonable means to protect it during its progress, and it is destroyed or injured, before completion and delivery, by an inevitable accident, over which the contractor had no control, and which could not have been prevented by reasonable efforts on his part, he is not liable, and the loss must fall upon the owner of the property."

These instructions were refused, and the following was given on application of the defendant:

"If the jury find from the evidence that the plaintiff and defendant entered into the contract of the 9th of February, 1872, whereby the plaintiff contracted to do all the carpenter and joiner's work, and furnish all the materials of sash work necessary for the construction and completion of a certain building therein mentioned; that while said building was in the course of erection by plaintiff, and when the frame of the same had been erected, and before any root had been placed upon said frame, the said building had been blown down by a sudden storm, then the court instructs the jury that said building was, up to the happening of said accident, at the risk of said plaintiff, and plaintiff cannot recover for the amount of work and labor and materials done and performed on the said building up to the time of said accident."

The plaintiff thereupon took a nonsuit, and, by the usual stages, has brought his case into this court upon a writ of error.

It seems to be conceded that the provision in the second contract abrogating the first did not operate to deprive the plaintiff of a right to compensation for the work done and materials furnished upon the first building, if he was otherwise entitled thereto. The first contract was abandoned, and a payment which had been made upon it was to be applied to the second. Thus the plaintiff's claim upon a *quantum meruit* appears to have been left open, and was so

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treated in the instructions asked for on both sides, as well as in the arguments submitted here. The controversy is thus narrowed down to the respective rights of the parties as affected by the accidental destruction which overtook the unfinished work. The true principles which control such a case as this are thus clearly stated in Addison on Contracts, at page 452: "If the contract price of the building is to be paid by installments, on the completion of certain specified portions of the work, each installment becomes a debt due to the builder as the particular portion specified is completed; and, if the house is destroyed by accident, the employer would be bound to pay the installments then due, but would not be responsible for the intermediate work and labor and materials." This doctrine, eminently consonant with right reason, has formed the basis of numerous adjudications in England and America. I am unable to say, after careful search, that it has ever been authoritatively gainsaid. It follows that no instruction asked for on either side in the present case should have been given. Upon the facts assumed to have been shown, the plaintiff may have been entitled to receive the amount of the first installment stipulated for, which became due when the framing was up, but had no claim for work and materials bestowed afterwards, and before the earning of the next installment, which was intercepted by the storm.

The defendant cites some authorities to show that a contracting party will not be excused from performance by inevitable accident, or the act of God. But these have no application here. If the defendant had insisted on the completion of the building as contracted for, notwithstanding its destructive prostration, he might have had his remedy upon the plaintiff's refusal to rebuild. But, instead of that, the parties abandoned the contract by mutual consent. So that nothing is left for inquiry but the measure of compensation, if any, which plaintiff may claim for the work and materials done and furnished.

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Other cases are cited by defendant, in which the contracts were indivisible, the entire compensation to be paid upon the completion of the work. These, also, are inapplicable, for reasons which already appear. Judge GANTT concurring, the judgment is reversed and the cause remanded; Judge BAKEWELL not sitting.

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GUSTAVE DOERGE, Plaintiff in Error, *v.* JACOB D. HEIMENZ, Administrator of JOHN F. HORST, Defendant in Error.

February 28, 1876.

1. Though, in the absence of notice of the grant of letters, the special statute does not bar a claim against an estate, the general limitation law is a bar independently of notice.
2. The grant of letters is a notorious act, and the administrator is liable to be sued from that date. Where suit has been commenced and the defendant dies, and the action survives, if the suit be not recommenced against the executor or administrator within one year from the grant of letters, and the claim is then barred by the general statute of limitation, it is forever barred.

ERROR to St. Louis Circuit Court.

Judgment of general term, reversing special term, affirmed and the cause remanded.

Gottschalk, for defendant in error, cited: Wag. Stat. 918, sec. 10; p. 919, sec. 20; p. 1049, secs. 2, 3; p. 1050, sec. 6; Ang. on Lim. (5th ed.) 47, sec. 56; Ayer's Admr. *v.* Donnell, Exr., 57 Mo. 396; Labeaume *v.* Hempstead, 1 Mo. 773; Rhodes *v.* Smethurst, 4 M. & W. 42; McKinzie, Admr. *v.* Hill, Admr., 51 Mo. 303; Graham *v.* King, 50 Mo. 22; Seibert *v.* Allen, 53 Mo. 44.

Jecko & Hospes, for plaintiff in error, cited: Montelins *v.* Sarpe, 11 Mo. 242; Hawkins & Co. *v.* Ridenhan, 13 Mo. 125; Bryan *v.* Mundy's Admr., 17 Mo. 556; Graham *v.* King, 50 Mo. 22; Wag. Stat. 919, 920, sec. 20.

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BAKEWELL, J., delivered the opinion of the court.

It appears from the record in this case that plaintiff commenced suit in the Circuit Court of St. Louis county, on February 1, 1869, against J. F. Horst and others, on a cause of action which accrued on January 1, 1867, which came under the clause of the statute barring a recovery after five years. On March 1, 1870, Horst died, and on March 29, 1870, his administrator was appointed.

The administrator failed to publish the notice of grant of letters required by law. On April 17, 1871, the death of Horst was suggested in the proceedings in the Circuit Court, and on February 27, 1872, the cause abated as to Horst. On March 21, 1873, this suit was commenced in the Circuit Court, by plaintiff, against Horst's estate, for the same cause of action sued upon before. It is apparent, from this statement, that at the time of the commencement of this action more than five years had elapsed since the right of action existed, and more than one year since letters of administration had been granted on the estate of Horst. On the trial in the court below, defendant asked the court to instruct the jury that, on the state of facts which are set forth above, plaintiff was not entitled to recover. The court refused so to instruct, and defendant excepted. There was a verdict and judgment for the whole amount claimed. On appeal to general term the judgment of the Circuit Court at special term was reversed.

Plaintiff brings the cause before us by writ of error.

The notice of grant of letters was published, by the administrator, in the German language in a German newspaper. The parties all spoke and read German. Nevertheless, this was not a compliance with the law, and it is as if no notice had been published at all.

The statute of limitations provides (Art. 1, sec. 20) that if any action shall have been commenced within the time prescribed in the preceding sections (in this case within five years), and if the right of action be such as survives (which

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was here the case), the plaintiff may commence a new action against the administrator of the defendant within one year after such death; or, if no executor or administrator be appointed within that time, then within one year after letters testamentary or of administration shall have been granted to them.

In this case the new action was not commenced until the lapse of two years and twenty days after death of the defendant, and two years, less one week, after the grant of letters. At the time of the commencement of the new suit, more than six years and two months had elapsed since the maturity of the claim.

It is settled in this state that, in the absence of notice of grant of letters, the special statute is no bar; but the general limitation law applies.

Now that law, in this case, ceased to run for the period of twenty-eight days only, during the time which elapsed between death and administration, so that this claim was barred by the general statute at the date of the commencement of this suit. *Ayers* v. *Donnell*, 57 Mo. 396.

Had the present suit been commenced within one year from the grant of letters, the plaintiff might still have had a right to prosecute his suit under section 20, Article 1, of the limitation law quoted above. The statute does not give him one year from the *date of* publication, but one year from the *grant of letters*. "The grant of letters was a notorious act, and ever afterwards the executor was clothed with authority to be sued, and was liable, at all times, to be proceeded against for the debts of his testator." This is the language of Judge Wagner in a similar case. *Ayers* v. *Donnell*, 57 Mo. In the case at bar it is of record that, when the death of defendant was suggested in the first suit, the note handed by counsel to the clerk, and placed and preserved among the papers, under the rule of court, contained a statement that letters had been granted, and gave the name of the administrator. We do not think this

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material. We are of opinion that the general statute of limitations was a bar to this action, and that it was so in the absence of any notice, actual or constructive, of the grant of letters. It was properly pleaded by defendant, and it was error to refuse his instruction on this point. The judgment of general term, reversing the action of the Circuit Court at special term, is, therefore, affirmed and the cause remanded. The other judges concur.

HIRAM S. PROBASCO, Appellant, v. PAUL BOUYON *et al.*, Respondents.

February 28, 1876.

1. Where a man has given his own name to a particular manufacture, and sells the use of his name in the manufacture of those particular goods, a court of equity will restrain him from advertising goods of the same quality under his own name, though actually made by him.
2. Where one named "Oakes" sold the exclusive right to manufacture and sell "Oakes' Candies," he was restrained from manufacturing and selling candies made by him as "Oakes' Candies."

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

M. L. Gray, for appellant, cited: Filley *v.* Fassett, 44 Mo. 168; Taylor *v.* Carpenter, 2 Sandf. (N. Y.) Ch. 617; *s. c.*, Am. T.-M. Cas. 14, 32; Stone *v.* Colan, Am. T.-M. Cas. 115; Browne on Trade-Marks, 94, secs. 32, 35, 52, 66, 144; Howe *v.* Howe Machine Co., 50 Barb.; *s. c.*, Am. T.-M. Cas. 421, 427; Croft *v.* Day, 7 Beav. 89; *s. c.*, Am. T.-M. Cas. 649, 651; Upton on Trade-Marks, 22, 23; Browne on Trade-Marks, secs. 39, 40, 41, 516, 395; Stonebreaker *v.* Stonebreaker, 33 Md. 252, 267; Beard *v.* Downs, 6 Ind. 200; Coats *v.* Holbrook, Am. T.-M. Cas. 30, and following; Bradley *v.* Norton, Am. T.-M. Cas. 338.

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T. J. Rowe, for respondents, cited: Bury *v.* Bedford, 10 Jur. (N. S.) 503; Hall *v.* Barrams, 10 Jur. (N. S.) 57; McAndrew *v.* Bassett, 10 Jur. (N. S.) 493; Wellington *v.* Fox, 3 Myl. & Cr. 338; 1 Story on Eq. (5th ed.), sec. 679; Alger *v.* Thacher, 19 Pick. (Mass.) 53; 17 Barb. (N. Y.) 608; Filley *v.* Fassett, 44 Mo. 168; Singleton *v.* Bolton, 3 Doug. 293; Bloss *v.* Bloomer, 23 Barb. 604; Faber *v.* Faber, 49 Barb. 357; Croft *v.* Day, 7 Beav. 66.

BAKEWELL, J., delivered the opinion of the court.

This is a bill in equity, filed by plaintiff against defendants, wherein he alleges that he was for some years in partnership with defendant Oakes in the business of manufacturing and selling candies called in the trade "Oakes' Candies," "Oakes' Pure Home-made Candies," etc., which candies were made, put up, and sold by them alone, and were a great source of profit; that the name was used as a trade-mark, and was the property of the firm, and so recognized by dealers; that he afterwards purchased, and now owns, the good-will and franchises of the firm, and the exclusive use of the name and trade-mark, which defendant Oakes then covenanted to warrant to him; that he has continuously since that date continued said trade and manufacture, and used and claimed and owned said business and name as his exclusive property; that defendants, confederating to injure him, are making and selling an article of candy under the names, tokens, and trade-marks so sold to him, and thereby deceiving the public and taking advantage of the reputation and trade-marks of plaintiff, to his damage $1,000; that he has no adequate remedy at law, and will be irreparably damaged by a continuance of such acts. He prays for an account of profits, and an injunction, and for general relief.

Defendant Bouyon, in his separate answer, denies all the affirmative allegations of the petition, and says that Oakes is, and for years before said partnership was, a practical candy-maker; that his name became attached to his can-

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dies, and only means that he makes them, as in fact he does; that the alleged bill of sale is void, so far as it sells the exclusive right to make and sell "Oakes' Candies;" that it is against public policy if construed to prohibit Oakes from making candy, and that, if Oakes does make candy, it must, of necessity, be Oakes' candy; that defendant makes and sells "Oakes' Candies" at his place of business in St. Louis, and has extensively advertised the same, as he lawfully might.

Oakes, in his separate answer, admits all allegations of plaintiff's bill as to their former partnership, the manufacture of candy by Probasco & Oakes, the dissolution of the firm, and the bill of sale; as to the rest, he answers as Bouyon does, and further says that he did not intend to sell, and knew he could not sell, the right to make Oakes' candy, or the use of his own name; denies that plaintiff has acquired the exclusive right to make and sell candies under said name and trade-marks, and denies that he or Bouyon are or were selling candies on Probasco's reputation, and says Probasco deceives the public by selling Probasco's candies under the name of Oakes'. He admits that at, before, and since commencement of this suit he was working for Bouyon, making candies for him, and that Bouyon advertised and sold them as candies made by Oakes.

The evidence proved the allegations in the bill, and showed that Oakes, in selling out to Probasco, charged specially for the use of the name; that Probasco and Oakes, when together, both made the candies and adopted the name of "Oakes' Candies" as the shorter name; that Probasco had a trade-mark of an oak tree; that he did not hold out to the public that the candies sold by him since the dissolution were actually made by Peter Oakes; that the reputation of the "Oakes Candies" was mostly local, though some orders were received from the country and from adjoining States; that plaintiff sells nothing as "Oakes' Candies" but what are made by himself; that he had repeatedly

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notified both defendants to desist from selling candies as "Oakes' Candies," and that they were doing so in a public place in St. Louis on a large scale.

The bill of sale was offered in evidence, and purports, in consideration of $2,016, to be a conveyance, by "Peter Oakes to Hiram S. Probasco and his legal representatives forever, of Oakes' one-half interest in the stock and equipments, good-will, and name of the firm of Probasco & Oakes, and the exclusive right to make and sell 'Oakes' Candy,' and to use the name thereof, and all the property and assets of said firm of Probasco & Oakes, and all the franchises thereof." It concludes with a covenant of warranty, and is under seal.

The court below dismissed the bill. Defendant duly excepted, and brings the case here by appeal, a motion for new trial being overruled.

We think the Circuit Court erred in dismissing the bill.

The names of "Oakes' Candy," "Oakes' Pure Candies," etc., were, it appears, first used and applied by Probasco & Oakes to candies flavored with fruits, and made and sold by that firm, and under that name acquired a reputation and sale. These names pointed out the origin and ownership of the manufacture. By the dissolution of the firm, and Oakes' sale to Probasco, the latter acquired the rights of the firm to this name. Oakes could so sell his name as to deprive himself of the right to use it for his own manufacture, and give that right to another, under the circumstances of this case, as detailed above. *Young* v. *Stonebreaker*, 33 Mo. 117.

It cannot be maintained that the name "Oakes' Candies" is, properly speaking, a trade-mark, or that its exclusive use can be vindicated on that ground. A man whose name is Oakes may make candies, and, if he makes them, he may call them "Oakes' Candies," and he cannot be restrained from doing so, in the absence of fraud or bad faith. It was held in *Curtis* v. *Bryan*, 36 How. (N. Y.) Pr. 38, that there

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could be no special property in the name of "Mrs. Winslow's Soothing Syrup" which would prevent any one of the name of Winslow from manufacturing an article which should be really a soothing syrup, and calling it by the proper name of the manufacturer, however this might injure the trade of a former Winslow who had largely advertised, and at great expense brought into public notice, a syrup with that name. But there are circumstances under which a man will be prohibited from giving his own proper name to a manufacture —circumstances which savor of fraud. Such was the case of *Croft* v. *Day*, 7 Beav. 84. Day & Martin entered into a partnership to manufacture blacking at 97 High Holborn, London; Martin retired, as in the case before us, and gave to his partner, Day, the right to use his name in the business. A nephew of Day, whose name was the same, seeing that the Day & Martin blacking had a high reputation, made an arrangement with a man named Martin for the use of his name, and began manufacturing blacking and selling it at No. 90 1-2 High Holborn, under the name of Day & Martin, and, on the application of the legal representatives of the original Day & Martin, who were both dead, he was restrained.

The case of *Campere* v. *Bajou* was decided in the Tribunal of Commerce, of Paris, and, on appeal, was affirmed by the Imperial Court of Appeals. In no country, perhaps, is the rule of commercial morality stricter than in France. The code of commerce of that country forbids persons who succeed to the business of another continuing it under his name. Bajou, a glove-maker, assigned his business, authorizing the assignee, exclusively, to adopt the description "Successor to Bajou," and to stamp his gloves with the manufacturer's mark, which was the *fac simile* of the signature of Bajou. Bajou, in violation of this agreement, sent gloves to New York stamped with his *fac simile*. He was prohibited from employing, for the future, his name as a manufacturer's mark upon his gloves, and was heavily fined.

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The tribunal said that Bajou had assigned the *fac simile* of his name as a manufacturer's mark, and to pretend that, because it was his name, he had still a right to apply it to gloves manufactured by him, would be, not only to seek to resume what he had assigned, and of which he had received the price, but also to apply for his own benefit the increased custom of the assignee. Reported in full in Upton on Trade-Marks, 73.

So, in like manner, whatever rights other men may have to the name of Oakes, this particular Oakes, the defendant in this case, will not be permitted to use the name of Oakes in the manufacture and sale of candy, at least in this locality, where the name has a peculiar signification and a business value, and where he is bound by a valid agreement to abstain from the use of his name. If it is claimed that Oakes has a right to use his own name, the answer is that he has no right to use it in this way, if he has sold that right, and if, as we hold, it was a right which he could sell and which plaintiff could acquire.

A court of equity will restrain a breach of contract or of covenant, and to do so in this case will not be against public policy or in restraint of trade. Oakes may still make and sell candy, but not under the name the use of which he has for this purpose sold. He may make and sell the very same candies, and is not obliged to conceal the fact that they are made by him; but he may not, in St. Louis, advertise them either by sign over his shop door, or by label on the boxes in which they are packed, or in any other general and public way, as "Oakes' Candies." Because, for a valuable consideration, he has covenanted with plaintiff and his legal representatives that he will not do so, and to the terms of this contract he must be held.

It is urged that to grant the relief asked for is to aid the plaintiff in practicing a fraud and deceit upon the public, by palming off upon the community candy as made by Oakes which is really manufactured by other men. But this is

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not so. It appears that these candies were originally made by Oakes and Probasco, and, in casting about for a name, they hit upon Oakes as being the shorter and more convenient word. In calling these candies "Oakes' Candies," the proprietor only takes advantage of a title which he has helped to make popular in the trade. He does not thereby hold out that these candies are actually made by Peter Oakes. The original "Gillott," the original "Day & Martin," the original "Rowland" are long since dead, but after their death their legal representatives were protected by the courts in the use of their names for their manufactures; and, in furnishing this protection, the courts did not consider that they were sanctioning deceit.

The principles above set forth seem to be fully sustained by the authority of well-considered cases. In our opinion it was error to dismiss the bill. On the pleadings and evidence a perpetual injunction should have been granted, restraining defendants from manufacturing or selling "Oakes' Candies," and an accounting ordered.

The judgment of the Circuit Court is reversed and the cause remanded. The other judges concur.

MARTHA MEAD, Respondent, v. LUCIAN MEAD, Appellant.

February 28, 1876.

1. A decree of divorce, granted upon a petition setting forth several causes for divorce, will not, if one of such causes be satisfactorily established, be disturbed because the others were insufficiently sustained by the proofs.
2. Since the revision of 1855 it has not been necessary, in any case, for the Circuit Court, upon trying a cause without a jury, to set out in writing its finding of the facts upon which the judgment is rendered.
3. The statute requiring divorce causes to be tried by the court is not unconstitutional, as impairing the right of trial by jury.
4. Judgment of affirmance entered as of the day on which the cause was submitted, by reason of the death of a party between that day and the delivery of the opinion.

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APPEAL from St. Louis Circuit Court.

Affirmed.

Henry H. Denison and *R. H. Musser*, for appellant, cited: Gillinswaters *v.* Gillinswaters, 28 Mo. 61; Twyman *v.* Twyman, 27 Mo. 383; Messenger *v.* Messenger, 56 Mo. 329; Hoffman *v.* Hoffman, 43 Mo. 547; Kempff *v.* Kempff, 34 Mo. 211; Bowers *v.* Bowers, 19 Mo. 352; Harper *v.* Harper, 29 Mo. 301; Hooper *v.* Hooper, 19 Mo. 355; Doyle *v.* Doyle, 26 Mo. 545; Cheatham *v.* Cheatham, 10 Mo. 296; Anderson *v.* Bank of State of Missouri, 1 Mo. 244; Kenly *v.* Kenly, 2 How. (Miss.) 751; Fulton *v.* Fulton, 7 Geo. (Miss.) 154; Holmes *v.* Holmes, Walk. (Miss.) 474; Walker *v.* Walker, 11 Geo. (Miss.) 154; Wag. Stat., sec. 2, p. 533; Wag. Stat., sec. 8, p. 535; Wag. Stat., sec. 9, p. 535; Bill of Rights and Const., Art. 17, Wag. Stat. 36; Practice Act, Wag. Stat. 1040; Stat. of Miss., sec. 6, 1824.

Martin & Lackland, for respondent, cited: Hooper *v.* Hooper, 19 Mo. 256; May *v.* May, 62 Penn. 206; Ross *v.* Ross, 9 Ark. 507; Baily *v.* Baily, 97 Mass. 375; Briggs *v.* Briggs, 20 Mich. 34; 1 Bishop on Mar. & Div. 55, 813; 2 Bishop on Mar. & Div. 657, 658; Brown *v.* Brown, 1 P. & D. 46; Bowers *v.* Bowers, 19 Mo. 351; Camp *v.* Camp, 18 Texas, 528; Mahone *v.* Mahone, 15 Cal.; Robbins *v.* Robbins, 100 Mass. 150.

GANTT, P. J., delivered the opinion of the court.

The petition was filed to the June term, 1872. It alleged a marriage in 1853; that plaintiff was for twelve years a true wife, and in all things fulfilled her marriage vows; that for six years past defendant has offered to her such indignities as to render her condition in life intolerable; that said indignities consisted of the following particulars:

1. Violent, abusive, and degrading reflections upon plaintiff, as that plaintiff was only fit for a gambler's wife; that she wanted another husband; that plaintiff and her sisters were hyenas.

2. Violent, abusive, and degrading reflections on the

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character and integrity of plaintiff's brothers, sisters, and kindred, as that they were barbarous; that the children of plaintiff should die before they should be raised with such barbarous people; that they were thieves; that they were false and perjured; that they were dishonest, greedy, and plotting to cheat and defraud plaintiff out of her estate. This has been continual for six years past. By this means plaintiff has been deprived of the society of her family.

3. Contemptuous and contumelious refusals to give plaintiff any information in regard to her property, and declaring that the same belonged to him.

4. Idle, lazy, and shiftless conduct, loafing in the streets and bar-rooms for six years, until his name and reputation have become an indelible indignity, disgrace, and reproach to his wife and family.

5. That he has been guilty of such barbarous conduct towards her as to endanger her life, in this, that in March and April, 1872, defendant made and uttered violent and mysterious threats to the effect that some one would have to die before this matter could be settled—referring to the plaintiff and her relatives—whereby she was placed in great bodily fear for herself, her children, and kindred.

6. Also that defendant has, for five years before the filing of the petition, been addicted to habitual drunkenness.

The petition was verified by affidavit. An answer was filed denying every allegation of the petition, and alleging that the plaintiff had, about April 1, 1872, deserted and abandoned defendant, her home, and children. The answer was verified by affidavit. At the June term, 1872, application was made by Mrs. Mead for alimony *pendente lite;* and also for the payment, by Mr. Mead, of a sum of money for fees and costs. This motion the court sustained on November 2, 1872.

At the same term Mead obtained leave to withdraw his answer and file a motion to strike out from plaintiff's petition "that portion of it commencing with the words

'that the defendant,' in the nineteenth line of first page, and ending with the words 'kindred and children,' in the twenty-fifth line of fourth page." This motion was overruled.

The cause was called for trial at the April term, 1873, of the Circuit Court. The taking of testimony commenced on May 5th, and was closed on the 9th, the court then taking the case under advisement. It was decided on the first day of the June term, 1873. The decree of the court is as follows:

"The court, being fully advised of and concerning the premises in this cause heretofore submitted to the court upon the pleadings and proofs, and, after hearing the evidence herein, being satisfied that the plaintiff is an injured and innocent party, doth order, adjudge, and decree that she be absolutely and forever divorced from the bonds of matrimony existing between her and said defendant, and that she be restored to all the rights and privileges of an unmarried person; and it is further ordered that the plaintiff have the exclusive care, custody, and control of the minor children of said plaintiff and defendant, until the further order of this court, and that the plaintiff recover of said defendant her costs herein expended, and have execution therefor."

A motion for a new hearing was overruled, and a bill of exceptions was filed on August 2, 1873, by which it appeared that, when the cause was called for trial, the defendant filed an affidavit in support of a motion for a continuance of the cause for two reasons, one being the absence of witnesses and the other the sickness of one of his counsel. The court overruled the motion, and defendant excepted. We see no error here. The witnesses who are asserted to be inaccessible appear by the record to have been all present in court, and all but one of them testified for defendant. No diligence or sufficient cause for a continuance is shown on the face of the affidavit; and this positive evidence disposes of this matter effectually.

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1. A great mass of evidence was then laid before the court. The number of witnesses examined, including both parties, was thirty-four. Their testimony covered 200 pages of very close manuscript. It is not necessary to analyze it in detail, and a great portion of it might have been profitably omitted—not because it had no tendency to prove the allegations of the petition, but because it was, as we think, insufficient to produce conviction that they were well founded as to the first five causes assigned for a divorce. In fact the only statutory cause for a separation of the parties which we consider to be established by the evidence is that which charges the defendant with habitual drunkenness for five years next before the filing of the petition. The period which is named in the statute as sufficient to justify a decree for a divorce is one year.

On this head, without setting out the evidence in detail, we content ourselves with saying that we consider it ample to justify the decree in all its particulars. We might easily fill many pages with the citation of the instances of intemperance by which for many years the almost daily life of the defendant has been characterized. He appears to have come to the city of St. Louis from Jennings' Station, on the North Missouri Railroad, nearly every day, except Sunday, for years. His habit was to leave home about seven in the morning and to return about six in the evening. Not to dwell on the manner in which he spent the day in town, where he seems to have been engaged in no business contributory to the good of his family, he appears to have been almost invariably intoxicated when he got on the cars to return home in the evening. We find scarcely a single exception to this remark. There were very few cases in which he was not still under the influence of strong drink when he reached his home, after his ride in the cars, and the walk or ride to his house from the station, a distance of less than a mile. Repeated instances are given of grossly unbecoming behavior which we will not enumerate. We remain perfectly satis-

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fied that this charge of habitual drunkenness, for many years preceding the commencement of this suit, is fully made out.

The other charges are subdivided into five particulars, but they may be grouped into two. They amount to the assertion of indignities which rendered the condition of the plaintiff intolerable, and of cruel and barbarous treatment. So far as we can judge, all that is said on these heads may be fairly referred to the brutality and general disorder of spirit produced by drunkenness. If the influence of strong drink could be eliminated from the character of the defendant; if all that appears to his disadvantage in this record could be purged of the effects of habits of intoxication, we are not at all convinced that anything would remain of which a court could take cognizance for the purpose of granting a divorce. We will not pursue this subject, for if one sufficient cause exists for the decree it is enough; and, as already stated, we are of opinion that one such cause is abundantly shown.

It is objected by the appellant that the court below should have found or declared the facts which it regarded as established by the evidence, and that, for the want of such a finding, the decree must be reversed.

Under the Practice Act of 1849 it was incumbent on the courts where any case was submitted to it—a jury being waived, or not required by law (sec. 2, Art. 15, p. 90, Session Acts of 1849)—to state in writing the finding as to the facts, and file this statement with the clerk. The judgment or conclusion of law then followed.

In the codification of the statutes, which occurred in 1855, this provision was omitted, perhaps unwisely; but it was certainly omitted, and no decision made under the act of 1849 can be authority for requiring the judgment of a court of law or the decree of a chancellor to recite the facts on which it is founded, since repeal of that act.

Formerly it was the practice in the United States Circuit Courts, sitting as courts of equity, to make a recital, in their decrees, of the facts examined and found by the court.

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This practice prevailed at least as late as 1850, but it must have been condemned as inconvenient, for, by a rule which is now numbered eighty-six of the Rules of Equity Practice, revised and published in 1870, it is directed that, "in drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor any other prior proceeding, shall be recited or stated in the decree or order, but the decree or order shall begin in substance as follows: 'This cause came on to be heard at this term and was argued by counsel; and, thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows,'" etc.

The forms and traditions of chancery are more carefully preserved in the federal courts than elsewhere, and we are quite safe in guiding our practice by theirs, in cases of equitable jurisdiction, whenever a dispute arises about forms. The decree in this case is in the form which has for many years, perhaps for time immemorial, prevailed in this circuit. It is familiar to the profession that, from 1825 to 1845, it was provided by the statutes respecting divorce that "the Circuit Court, sitting as *a court of chancery*, shall have jurisdiction of all cases of divorce and alimony or maintenance;" that, in 1855, and since, all distinction between law and equity being abolished, the rule has been declared in somewhat different language, but to the same effect, "that all such cases shall be tried by the court without the assistance of a jury." And we fail to see in the form of the decree in this case any error whatever.

It is further objected that the statute conferring upon the Circuit Court the right to determine causes of divorce without the aid of a jury is unconstitutional, in that it impairs the right of trial by jury, secured by the Constitution of Missouri to every citizen.

The principal argument seems to be that the legislation respecting the practice in divorce cases is different now from what it was in 1825. This is a mistake, as has just

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been shown. The practice, or at all events the statute regulating the practice, has been unchanged for more than fifty years. As to right of "trial by jury," it is well known that it refers to the right of personal security conferred, when a man is charged with crime, by the privilege of being judged by his peers; and when it is added that the statute in question, and the 11th, 12th, and 13th sections of Article 9 of the Practice Act (pp. 1040, 1041 of 2 Wag. Stat.), have repeatedly received the sanction of the Supreme Court, we think it unnecessary to pause on this objection.

Since this opinion was written we have learned that Mr. Mead has died. He was alive, however, when the case was argued and submitted. Under these circumstances the judgment will be entered as of the day on which it was taken under advisement, which was January 28, 1876. Such was the practice of the Supreme Court in the case of the *Central Savings Bank* v. *Shine*, 48 Mo. 456, following the ancient practice in England as laid down in *Cumber* v. *Wane*, 1 Stra. 426.

All the judges concurring, the judgment of the Circuit Court is affirmed.

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HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Respondent, *v.* JOHN R. SHEPLEY *et al.*, Appellants.

February 28, 1876.

1. In an action on a bond, executed in an injunction suit in the Circuit Court of the United States, conditioned to pay all damages or costs that may be occasioned by the injunction, the word "damages" will be taken to include reasonable counsel fees actually paid.
2. Such a bond must be interpreted, as any other contract, by the rules determined by the Supreme Court of Missouri; although a different interpretation may have been applied in cases by the Supreme Court of the United States. The rulings of the former are not merely authoritative; they are binding law in this State.

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APPEAL from St. Louis Circuit Court.

Affirmed.

Glover & Shepley, for appellants, cited: Oelrihcs v. Spain, 15 Wall. 211; Gadsden v. Bank of Georgetown, 5 Rich. 336–346; Corder v. Martin, 17 Mo. 42, 43.

Reber, for respondent, cited: Uhrig v. City of St. Louis, 47 Mo. 528; State, to use, v. Beldsmeier, 56 Mo. 226; Rose v. Thomas, 19 Mo. 613; Hayden & Smith v. Sample, 10 Mo. 215; Edwards v. Bodins, 11 Paige, 223; Corcoran v. Judson, 24 N. Y. 106; Garret v. Logan, 19 Ala. (N. S.) 344; Sedgw. on Dam. (5th ed.) note, top p. 488, side p. 397; 15 Wall. 211.

BAKEWELL, J., delivered the opinion of the court.

This is an action on a bond executed by appellants, on behalf of the plaintiff, in an injunction suit brought by one John Bailey against the Hannibal & St. Joseph Railroad Company, in the Circuit Court of the United States for the District of Missouri. The bond is conditioned that the said Bailey shall pay the Hannibal & St. Joseph Railroad Company any damages or costs that might accrue to it or be occasioned by the injunction. The injunction was dissolved on hearing, the suit dismissed, and that decree affirmed on appeal to the Supreme Court of the United States. The breach assigned is that plaintiff in this suit was compelled to employ counsel to defend, at a cost of $2,500, which sum plaintiff in this suit paid, and Bailey has not repaid the same to plaintiff. The answer of defendant denies the liability of Bailey for counsel fees. The case was submitted to the court below, on an agreed statement of facts, in which the facts set forth above are admitted, and also that the attorney's fee of $2,500 was reasonable.

Defendant asked a declaration of law to the effect that, on the facts, the plaintiff was not entitled to recover. This the court refused, and rendered judgment for plaintiff. Defendant excepted, and having duly moved for a new trial, that motion was overruled, and the case is brought here by defendant on appeal.

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The question submitted for our determination is whether or no attorney's fees can be recovered as damages in a suit on an injunction bond.

It seems to be usually held by the State courts that the damages, on the dissolution of an injunction or attachment, include the reasonable counsel fees of the defendant. In some States a distinction is made between those cases in which the fees are actually paid and those in which, at the time of suing on the bond, they are a mere liability of the defendant in the original suit. As in this case the agreed statement admits the payment of these fees, the decisions in Louisiana and California are in point, as well as those in New York, Kentucky, Alabama, Indiana, and New Hampshire; and in all these States it is held that counsel fees may be recovered as damages in a proceeding on an injunction or attachment bond. Sedgw. on Dam. 488, and note.

In Alabama (*Garrett* v. *Logan*, 19 Ala. 144) it is held that counsel fees necessarily incurred in defense of an injunction suit may be recovered in an action of debt on the bond, though they may not be actually paid. If contracted to be paid, it is enough.

The condition in an attachment bond in this State is that plaintiff "pay all damages and costs that may accrue to" the defendant. The condition in the bond sued on is that the obligor "pay to the Hannibal & St. Joseph Railroad Company any damages or costs that may accrue to said company." The conditions in the two bonds are identical. We can see no reason why the same rule should not apply in the case at bar as in a suit on an attachment bond. But it is settled law in this State (*State, to use, etc.*, v. *Beldsmeier* et al., 56 Mo. 226) that in a suit on an attachment bond the plaintiff in the suit can recover for any direct loss or damage, and that this includes reasonable counsel fees. So in *Uhrig* v. *City of St. Louis*, 47 Mo. 528, our Supreme Court states the common practice to be as we have set it forth, and approves of it. The question can hardly, we

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think, be considered an open one in this State. Indeed, it is not an open one, unless there be some distinction between the condition in an attachment bond and the ordinary condition in the usual bond required on granting a restraining order. In the case at bar, as we have said, the condition is *ipsissimis verbis* with the bond before the court in *State, to use, etc.*, v. *Beldsmeier*.

Both authority and reason incline us to affirm the judgment of the court below. But our attention is directed to the case of *Oelrichs* v. *Spain*, 15 Wall. 211. In view of this decision it cannot be denied that it is the practice in the Supreme Court of the United States to refuse counsel fees as damages in a suit on an injunction bond; and it would appear from *Arcambel* v. *Wiseman*, 3 Dall. 306, decided in 1796, that this was the view of that venerable tribunal eighty years ago. And, upon the reasoning and analogy of *Arcambel* v. *Wiseman* (for the point is not expressly decided there), the court seems to have based its more recent decision. It is difficult to see how, otherwise, attorney's fees could have been refused in the case of *Oelrichs* v. *Spain;* for in that case the condition of the bond, upon whose express terms the claim is founded, is peculiar, and the obligation is to pay as well such costs, damages, and charges as shall occur in the Circuit Court, *as all such costs, damages, and charges as shall be occasioned by said writ of injunction.* These superadded "costs, damages, and charges," are not to be referred to those in the Circuit Court, for these are specifically provided for; and the latter clause would seem to have no meaning at all, if it does not mean counsel fees. The court, in its opinion, does not at all advert to the fact that the obligor in the bond had solemnly contracted to pay, not only the costs of the legal proceedings in the Circuit Court, but also all other costs, damages, and charges occasioned to defendant in the original suit by the issuing of the writ. If attorney's fees had been so nominated in the bond it could hardly have

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been plainer, and it would seem to me, to use the language of the court in *Edwards* v. *Bodine*, 11 Paige, 223, that "here is not matter of discretion; the condition is imperative." The reasons given by the court for refusing counsel fees are that damages are recovered in debt, case, and *assumpsit*, but counsel fees are never included; that in equity cases, where no injunction bond is given, only taxable costs are allowed to complainants; that the same rule applies to the defendant, however unjust the litigation; and both parties are, in this respect, on a footing of equality. To this it may be replied that, in these cases, the law implies no obligation to pay counsel fees not taxed as costs; but the case may well be different where the plaintiff covenants to pay all loss and damage which may result to plaintiff by his action in restraining him in the exercise of his rights. The other reasons assigned by the learned judge delivering the opinion of the court are that there is no fixed standard of *honorarium;* that there is danger of abuse when client and counsel know the fees are to be paid by another party; that a new litigation may be thus grafted on the old suit, and the court even may be required to perform the delicate task of scaling down the charges of counsel. We have considered all these reasons, with great respect, but they have not satisfied us that the principle of disallowance rests on a solid foundation, nor that the opposite rule is forbidden, either by the analogies of the law or by sound public policy.

It is argued by counsel for defendant in this case that, as this bond was given in proceedings in equity of a Circuit Court of the United States, the obligation must be interpreted in view of the decisions of the Supreme Court of the United States; and the case is as if, by statute of the United States, it had been enacted that no counsel fees should be recovered in a suit on an injunction bond given in a proceeding in a Federal tribunal. But this reasoning is more specious than solid; no such statute exists. A bond of this kind is to be interpreted by the rules that govern the interpretation of

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any other contract. If the obligor, when executing it, knew that under the ruling of the Supreme Court of the United States he could not be held by this obligation to pay counsel fees, he also knew that by the interpretation put by the Supreme Court of the State of Missouri upon the same obligation, in a similar proceeding, he would be held for counsel fees in case of failure to maintain his injunction. If it is evident that, if it were necessary to sue on this bond in the Circuit Court of the United States, counsel fees would not be recovered, it is also clear that, in a suit upon the same bond in a State court, in any one of the many States in which judicial decisions have fixed the rule of giving counsel fees as damages, a recovery would be had. The contract before us must be interpreted by us in obedience to ruling *in pari materia* by the tribunal which, in this State, is the court of last resort. The interpretation which the Supreme Court of the United States may have given to a similar contract is entitled to the very greatest weight, but the interpretation given by our own Supreme Court to such a contract is, in Missouri, binding law, and the absolute rule by which we must measure our own.

It is further objected that any decisions in Missouri by which counsel fees have been given as damages on injunction bonds are based upon the peculiar provisions of our Practice Act in regard to injunction suits in our State courts. But the Practice Act is silent as to any interpretation of the word "damages" in the injunction bond. It limits the damages to 10 per cent. in certain cases, but, as it prescribes that the bond shall be conditioned that plaintiff shall "pay all sums of money, damages, and costs that shall be adjudged against him," it is plain that any judicial interpretation of this language, in a bond given under our statute, would be in point in determining the meaning of the same language in the bond under consideration in the present suit.

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For these reasons we think that the judgment of the Circuit Court should be affirmed. Judge LEWIS concurs; Judge GANTT, having been of counsel, did not sit.

GERMAN NATIONAL BANK, of Chicago, Respondent, *v.* ROBERT P. STUDLEY, Appellant.

February 28, 1876.

1. An instruction assuming the existence of facts not proved, or as to which the evidence is contradictory, is properly refused.
2. Though a general power to indorse or make promissory notes on behalf of his principal will not warrant an agent in putting the name of his principal to paper for the accommodation of the agent or a third party, yet where this is done with the assent of the principal, for the purpose of taking up paper upon which the principal is already liable as accommodation maker or indorser, the principal will be bound.

APPEAL from St. Louis Circuit Court.

Affirmed.

M. L. Gray, for appellant, cited: Chouteau *et al.* *v.* O. D. Filley, 50 Mo. 174 (begin on p. 177); State of Missouri *v.* Bank of Missouri, 45 Mo. 538; Pars. on Notes & Bills, 91; Story on Ag. (8th ed.) 185, sec. 147; Wood *v.* Goodridge, 6 Cush. (Mass.) 117; Story on Ag. (8th ed.) 256, sec. 210; Back *v.* Ayman, 3 Hill (N. Y.), 262; Stiner *v.* Taylor, 3 Hill (N. Y.), 279.

Finkelnburg & Rassieur, for respondent, cited: 1 Pars. on Notes & Bills, 108, 142.

BAKEWELL, J., delivered the opinion of the court.

This is a suit on a negotiable promissory note dated Chicago, July 8, 1871, for $1,000, with interest from date at 6 per cent., payable twelve months after date, to the order of R. P. Studley & Co., and indorsed "R. P. Studley & Co." The note is made by William H. Rice.

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It appears that the name of R. P. Studley & Co. was not written by R. P. Studley himself, who, at the time, was trading alone as R. P. Studley & Co., but by one Edward P. Rice, his former partner; and the defense relied upon is that Rice was not authorized to indorse the note, and that the indorsement was made without the knowledge or consent of defendant.

The evidence shows that defendant and Edward P. Rice were partners in St. Louis, from 1862 till March 20, 1870, as R. P. Studley & Co., at which time the partnership was dissolved; but Rice remained with Studley for two years longer, as his general business and financial agent, keeping his books and attending to his discounts and collections, and making, indorsing, and accepting commercial paper for Studley by the name of R. P. Studley & Co., in virtue of a power of attorney, executed by Studley the day after their dissolution, which expressly constituted Rice the general agent of Studley, and gave him power, at discretion, to make, accept, and indorse any and all mercantile paper for R. P. Studley & Co. Under this general power, Rice, with Studley's knowledge, indorsed, accepted, or made mercantile paper to the amount of about $100,000, in two years.

It also appeared that, in 1868, a brother of Edward P. Rice, William H. Rice, of Chicago, who had for two or three years been in embarrassed circumstances, failed. At that time Studley & Co. were liable on William H. Rice's paper as accommodation acceptors to about $30,000. This indebtedness was carried along, in Chicago banks principally, and gradually reduced by the giving of new paper of Studley & Co., and payments by Edward P. Rice, until it was reduced to about $5,000 at the time of the dissolution of the partnership of Studley and Rice. Of these transactions Studley was aware, at least in a general and confused way. He knew that his name was being used by Edward P. Rice, in Chicago banks, to help his brother Wil-

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liam, and he consented to it. In 1868 Studley signed the firm name himself to renewal acceptances, growing out of these transactions, to the amount of $12,500. If he did not understand the full details, and know exactly to what amount he was liable from time to time on this paper, it appears to have been because he chose to leave the whole thing to be managed by Edward P. Rice, who was unwilling to harass Studley with details of a dangerous negotiation into which Studley had been led out of kindness to Edward Rice, and into which Edward Rice had been drawn by a hope to save his brother. About the date of the dissolution of copartnership, Edward P. Rice went, at Studley's suggestion, to Chicago; Studley & Co. being then liable for about $5,000, principally in Chicago banks, on account of accommodations for William H. Rice. Renewals were then obtained for sixty and ninety days, and, when they matured, the matter was arranged with the bank that held the paper, by taking 80 per cent. for the debt. Two notes of William H. Rice at one and two years, respectively, for $1,000 each, and one note of William H. Rice for $800, all indorsed by Studley & Co., and one note of William H. Rice, without indorsement, were to be delivered to the bank in pursuance of this understanding. The notes were made and delivered to the bank, and the indorsement of R. P. Studley & Co. made by Edward P. Rice. The note sued on is one of the notes executed in accordance with that arrangement. Edward P. Rice swears that when this arrangement was completed, and these last notes given in settlement, he told Mr. Studley what had been done. Studley then asked him, "Whose name is on the back of the paper?" to which he replied, "R. P. Studley's, of course." It is also shown that, at the time plaintiff took the note sued on, it was familiar with the signature of R. P. Studley & Co. in Edward P. Rice's hand, having frequently received checks so signed, in payment of acceptances made by the same hand in the same name, which checks were always paid;

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and that notices of the maturing acceptances, in satisfaction of a portion of which the note sued on was given, had been habitually sent by plaintiff to St. Louis, by mail, directed to R. P. Studley. The oral testimony is very lengthy and somewhat contradictory, the principal witnesses being Edward P. Rice, for plaintiff, and R. P. Studley, for the defense. As to the main facts, however, they agree. The only other oral testimony is that of plaintiff's cashier, whose statement is that, at the time the note sued on, with the other notes mentioned above, were given in settlement of William H. Rice's debt, his total indebtedness at the bank was about $4,300, of which only about one-half was acceptances of R. P. Studley & Co. In this respect he does not accord with Rice, who believes that the acceptances of Studley & Co. held by the bank at the time of settlement were over $3,500, or, at least, represented a larger sum than $2,800, the total amount of new notes which he indorsed in Studley's name.

No exceptions whatever were taken to evidence. No instructions were asked by plaintiff. Of five instructions asked by defendant two were refused, to which defendant excepted. There was a verdict and judgment for plaintiff, and, a motion for a new trial having been overruled, defendant brings the case here by appeal.

It is insisted that the court below erred in refusing to give the following instruction asked by defendant:

"The power of attorney read in evidence only authorized E. P. Rice to indorse the name of the firm of R. P. Studley & Co., composed of R. P. Studley, on the paper of the firm connected with its regular business, and if the note sued on was outside of its regular business, and accommodation paper of the firm of R. P. Studley & Co., composed of said Studley and E. P. Rice, said power of attorney was no authority to said Rice to indorse the name of R. P. Studley & Co., as composed in 1871, on the note sued on."

We see no error in the refusal of this instruction. The

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power of attorney, in so many words, authorized Rice, "for me and in my name, at his discretion, to draw and sign any bill or bills of exchange, or promissory note or notes, to accept any bill or bills of exchange drawn on R. P. Studley & Co., to indorse any promissory notes, bills of exchange, orders, or checks in the name of R. P. Studley & Co."

It certainly might be regarded as a sufficient warrant for the execution of the note sued on, under the circumstances detailed in the evidence and set forth above.

It is also urged that it was error to refuse to instruct, at the request of defendant, as follows:

"Even though E. P. Rice was authorized to sign the name of R. P. Studley & Co. on paper given in renewal of the acceptance of said firm, that authority would not authorize him to indorse said name on the note sued on, composed partly of the accommodation acceptances of said firm and partly of the individual indebtedness of W. H. Rice; and plaintiff, taking said indorsement on the note sued on with knowledge of the fact that it included in part the individual indebtedness of W. H. Rice, was bound to inquire as to the extent of the authority of said Rice."

This instruction was properly refused, because it declares as a fact that the note sued on was composed partly of the individual indebtedness of William H. Rice, as to which the evidence is contradictory. That a general power to indorse notes in the name of R. P. Studley would have been no authority to indorse a note for the individual indebtedness of the agent, or of a third party, and that a person taking such a note, so indorsed, with knowledge of the facts, in the absence of the consent to, or ratification of, the act by Studley, could not recover upon it against Studley, may be true enough as an abstract proposition of law; and it may be that there was some evidence in this case which would have warranted the asking of such a declaration of law on behalf of the plaintiff. But the instruction, as asked,

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assumes a fact not proved, and was properly refused. There is no question whatever that the unpaid acceptances of Studley, held by the party to whom the note sued on was given at the time of its execution, and in satisfaction of which this note of $1,000, together with two others secured by Studley, for the total sum of $1,800, and Rice's unsecured note for $600, were received, amounted to $2,200, at the least, and there is evidence tending to show that they reached to over $4,000. In our opinion, the evidence strongly tends to show, not only that this note was given wholly in satisfaction and compromise, on terms very favorable to Studley, of an existing liability for a large amount, but that Edward P. Rice was directed by him to go to Chicago for the purpose of making such arrangement, and that Studley was informed of, and assented to, the execution and delivery of the note sued on, shortly after the return of Rice.

We see no error in the record to warrant a reversal. The judgment of the Circuit Court will be affirmed. The other judges concur.

ADOLPH GLUCK, Respondent, v. CARL DIEBOLD *et al.*, Appellants.

February 28, 1876.

Upon appeal from a justice of the peace to the Circuit Court, where notice of the appeal must be given to the appellee, an acknowledgment of notice to take depositions in the cause, with waiver of *dedimus* by the appellee, will not suffice as a waiver of notice of the appeal. (GANTT P. J., dissenting.)

APPEAL from St. Louis Circuit Court.

Affirmed.

Joseph T. Tatum, for appellants, cited: Rector v. Circuit Court of St. Louis County, 1 Mo. 607; Hempstead v. Darby, 2 Mo. 25; Bonney v. Baldwin, 3 Mo. 50.

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Lee & Adams, for respondent, cited: Wag. Stat., ch. 82, Art. 9, secs. 21, 22; Rowley *v.* Hinds *et al.*, 50 Mo. 403; Purcell *v.* Hannibal & St. Jo. R. R. Co., 50 Mo. 504; Wag. Stat., ch. 38, Art. 1, sec. 16, p. 344; McGregor *v.* Leighton, 37 Mo. 597.

LEWIS, J., delivered the opinion of the court.

Plaintiff obtained judgment, before a justice of the peace, for $154.35, from which defendants appealed to the Circuit Court, on a day subsequent, but within ten days after the judgment. No written notice of the appeal was served on the plaintiff; but, after the transcript was filed, his attorneys acknowledged service of a notice from defendants to take depositions in the State of Ohio. This acknowledgment included a waiver of the issue of *dedimus* and of all exceptions as to time. After the lapse of two terms of the Circuit Court, plaintiff moved for an affirmance of the justice's judgment, for want of notice of the appeal. This motion was sustained.

It is contended by defendants that the acknowledgment of notice for the taking of depositions in the cause, with the waiver of *dedimus*, was a waiver of, and therefore equivalent to, notice of the appeal. He refers to a number of cases decided by our Supreme Court, wherein the action of the appellees was held to be tantamount to waiver of notice, or to imply an appearance for the general purposes of the suit, which would in itself be a waiver. But in all these cases the acts were done in open court. There was, in each instance, an actual appearance for some purpose other than that of objecting to the want of notice. I do not think that the language of the Supreme Court, in any of the opinions, can properly be applied to an act *in pais*, which is neither a notice within the terms of the statute, nor an express waiver thereof.

In *McClurg* v. *Willard*, 5 Watts, 275, the plaintiff was entitled to notice of a certain special defense. His attorney signed an agreement, in writing, that a deposition

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which established that defense, and the taking of which he attended, should be read in evidence. It was held that this was no waiver, and did not dispense with the notice required by law. Chief Justice Gibson said: "Knowledge is certainly not notice; for, though the suitor may know that his adversary is taking precautionary proofs of particular facts, he has no warrant to anticipate that he will be called on to rebut them. It will, perhaps, be found the safest course, in the end, to go by the plain directions of the rule, instead of attempting to satisfy its exigencies with equivalents."

I can see no reason why a voluntary acceptance of notice to take depositions should have any greater effect than a service of the same notice made by the proper officer. In either case the deposition is freed from objection as an *ex parte* proceeding, and this is all that the notice is intended to accomplish. Will it be pretended that, if the plaintiff or his attorney had been regularly served with this notice, it would have stood in the place of the statutory notice of appeal? There would be a vast difference between the "knowledge" thus incidentally imparted and the actual appearance of the party in court, submitting himself to its appellate jurisdiction by taking an open part in the proceedings. If a defendant who had not been summoned in a cause should accept a notice for the taking of depositions, no lawyer would call this equivalent to a voluntary appearance, dispensing with the service of process. The example may not be strictly analogous, but it is nearly enough so to direct attention to the principles involved.

Acceptance of notice for depositions and waiver of *dedimus* constitute a professional courtesy in daily practice among the members of our bar. It would be a sad check upon the impulses by which this is prompted to establish a rule whose effect would convert an attorney's courtesy into a surrender of rights not at all within his contemplation. Judge BAKEWELL concurring, the judgment is affirmed.

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Judge GANTT concurs in affirming the judgment, but not in the views expressed as to the acceptance of notice to take depositions with the waiver of *dedimus*. This, he thinks, if done at the term to which the appeal was returnable, would amount to a waiver of notice.

JOHN DAMM, Respondent, *v.* PATRICK O'CONNELL, Appellant.

February 28, 1876.

A constable having levied upon personal property, the defendant in execution replevied the same. In the replevin suit the constable obtained judgment for the property, or its assessed value, at his election. He elected to take the money, which was paid him, and which exceeded the amount necessary to satisfy the execution. *Held*, that the constable was compellable by law to refund the surplus to the execution defendant.

APPEAL from St. Louis Circuit Court.

Affirmed.

Jecko & Hospes, for appellant, cited: Bloebaum *v.* Slattiry's Admr., 56 Mo. 183; Dilworth *v.* McKelvey, 30 Mo. 149.

Edward C. Kehr, for respondent, cited: State, to use, *v.* Platte *et al.*, 52 Mo. 466.

LEWIS, J., delivered the opinion of the court.

This was an agreed case, submitted to the Circuit Court upon a statement of facts substantially as follows: Defendant, as constable, held an execution upon a judgment against the plaintiff, as surviving partner of the late firm of J. C. Schnell & Co., which he levied upon some of the partnership effects. Plaintiff replevied the property by a suit in the Circuit Court, wherein the defendant recovered judgment for return of the property, or for $352, its assessed value, at his election. He elected to take the money, which was thereupon paid by plaintiff, amounting, with interest, to $359.01, of which only the sum of $259.74 was required to satisfy the execution in defendant's hands. Plaintiff

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demanded of defendant repayment of the surplus of $99.27, which was refused. This proceeding was then instituted to ascertain the respective rights of the parties. Plaintiff obtained judgment at special term for $114.15, including interest from date of the demand; which judgment being affirmed in general term, the defendant appealed.

When the constable acquired the money proceeds of the replevin suit, these stood in place of the property on which he had levied. The defendant in execution was as much entitled to the surplus remaining after satisfaction of the demand as if the officer had sold the property for the same amount in cash. Some technical distinctions are attempted, touching the presumption of ownership in defendant, arising from the result of the replevin proceeding. But they cannot prevail in face of the facts set out in the agreed statement. It is remarkable, to say the least, that the defendant should have supposed he could thus speculate with impunity upon the property of others, which, as a sworn public officer, he had taken into custody for fiduciary purposes. The other judges concurring, the judgment is affirmed with 10 per cent. damages.

FORD SMITH, Respondent, v. CARL SAUERWEIN, Appellant.

February 28, 1876.

Where the court, sitting as a jury, refuses instructions based on a supposed state of facts, and it afterwards appears from the finding that the court, as trier of the issues, did not believe such facts to have existed, such refusal cannot be declared erroneous.

APPEAL from St. Louis Circuit Court.

Affirmed.

Gottschalk, for appellant.

Ford Smith, for respondent.

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BAKEWELL, J., delivered the opinion of the court.

This is a suit upon a promissory note, dated July 31, 1872, made by defendant, and payable sixty days after date, to the order of Joseph Degenhart & Co., with interest from date, at 10 per cent. per annum. The suit was originally before a justice of the peace, and judgment was given for plaintiff. On trial anew in the Circuit Court, judgment was again given for plaintiff, on February 10, 1874, for $138.30. A *remittitur* was entered by plaintiff for $69.80, leaving a judgment of $69.

The defendant asked ten lengthy instructions, of which two were given and eight refused. To the refusing of these instructions defendant excepted at the time, and having in due time filed a motion for a new trial, which was overruled, the case is brought here, by defendant, on appeal.

The testimony of Joseph Degenhart was to the effect that the note sued upon was given for the interest due upon a book account for $1,350, due by defendant for an account for lumber; that the principal debt was paid by the transfer of some real estate, and the note in suit given for the interest; that no part of the note was ever paid, except $5 or $10 which defendant paid witness on account of the note. There was other testimony tending to show that the note sued on was given for the interest due on July 31, 1872, on two notes for $700 and $650 respectively, dated January 2, 1872, at sixty and ninety days, with interest from date at 8 per cent. per annum, made by defendant to the order of Joseph Degenhart & Co.

At the instance of defendant the court gave the two following instructions:

"If the court finds that the note sued upon was given for interest accrued on two notes, and for protest fees, and that the total amount thereof did not, at the date of the execution of the note sued on, amount to $120, then there was a partial want of consideration of said note."

"If the court believe from the evidence that the consid-

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eration of the note sued upon was the amount of interest accrued from the two notes read in evidence, dated January 2, 1872, and the protest fee, and that such amount was less than the amount of the note dated July 31, 1872, then plaintiff cannot recover the full amount of such note sued on."

Eight other instructions, all declarations of law based upon the idea that the note sued on was given for interest on the two notes mentioned in the second instruction set out above, were refused.

As the court, sitting as a jury, gave defendant's two instructions above, and then gave a verdict for the full amount of the note sued on and interest, it is clear that it thereby found, as a fact, that the note was given for the consideration sworn to by the witness Degenhart, and not for interest on the two notes mentioned above. The law applicable to the case was sufficiently set forth in the instructions given, and, without setting out in full the instructions refused, we say that we see no error in refusing them. To ask a court to give three foolscap pages of instructions, many of them almost identically the same, and putting in every possible shape the legal consequence which might follow from a supposed state of facts which the court, sitting as a jury, by its verdict, taken together with the instructions given, most completely negatives, may have seemed a proper precaution to the counsel trying the case for defendant. But we are not prepared to say that it was error in the learned judge before whom the cause was tried to refuse to mark as given a catalogue of instructions amounting to a small treatise, based upon a view of the case which, in his judgment, as trier of the fact, was not warranted by the evidence.

The judgment of the Circuit Court is affirmed. The other judges concur.

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JAMES WARD *et al.*, Respondents, *v.* HENRY H. BODEMAN *et al.*, Appellants.

February 28, 1876.

1. The registered owner is not necessarily the sole legal owner of a vessel. To make the register evidence of property, it must be shown that it was made with the assent of the party sought to be affected by it.

2. The mere fact of part ownership of a boat does not make the part owners copartners.

3. The master of a boat, in ordering supplies, is the agent, not of the owner of the boat, as such, but of those who have control of the vessel and the right to receive her freight; and mere ownership of a vessel, without any right to the profit or usufruct, will not of itself make one liable for supplies furnished to her.

4. One who has loaned money to a boat, and has a claim, to some extent, upon her earnings for repayment, does not, by these facts, become liable for supplies furnished to her, when these facts are known only to the owners and himself.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Hitchcock, Lubke & Player, for appellants, cited: Glasgow *v.* Ridgley, 11 Mo. 26; Walsh *v.* Agnew, 12 Mo. 525; Fox *v.* Webster, 46 Mo. 185; Prim *v.* Raboteau, 56 Mo. 407; Bauer *v.* Franklin County, 51 Mo. 206; Harrington *v.* Fry, 2 Bing. 180, 181; Schneer *v.* Lemp, 17 Mo. 142; Fine *v.* Public Schools, 30 Mo. 176; Anderson *v.* Kincheloe, 30 Mo. 520; Gilliam *v.* Ball, 49 Mo. 249; Jones *v.* Jones, 57 Mo. 142, 143; Trewhella *v.* Rowe, 11 East, 436, Lord Ellenborough, C. J.; Boat and Ship Registry Laws of the United States, Rev. Stat. of U. S., title 17, and particularly secs. 4192, 4196; Campbell *v.* Dent, 54 Mo. 325, and cases cited; Story on Part. (5th ed.) sec. 49; Pars. on Part. (6th ed.) 69.

Rankin & Hayden, for respondents, cited: Pars. on Part. (ed. 1867), ch 6, p. 62, text and note *a*; Myers *v.* Waller, 17 C. B. 77, 33 Eng. Law & Eq. 204; 1 Pars. on Ship. & Ad. (ed. 1869), ch. 5, p. 129, *et seq.*, and notes;

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Howard *v.* Odell, 1 Allen (Mass.), 85; Blanchard *v.* Fearing, 4 Allen (Mass.), 188; White's Bank *v.* Smith, 7 Wall. 646; Aldrich *v.* Ætna Co., 8 Wall. 491; Blanchard *v.* Brig Martha Washington, 1 Cliff. 463, 471; Mott *v.* Ruckman, 3 Blatchf. 71; 1 Pars. on Ship. & Ad. (ed. 1869), ch. 4, p. 91; 1 Pars. on Ship. & Ad. (ed. 1869), ch. 5, pp. 125, 126, 131; Hinton *v.* Law, 10 Mo. 701; Kenzel *v.* Kirk, 37 Barb. 113; Owens *v.* Davis, 15 La. An. 22; Merritt *v.* Walsh, 32 N. Y. 685.

BAKEWELL, J., delivered the opinion of the court.

Plaintiff's claim, in their petition, $1,536.48 for supplies for the use of the steamer 'Kate Kearney,' which they say defendants, at the time the goods were furnished, owned, and were engaged in running on their joint account.

Defendant Erfort filed a separate answer denying that he owned the boat, or any interest in her, or that he was engaged in running her, or interested in her profits, or a copartner with the other defendants in the business of running the boat. The other defendants filed a joint answer denying every material allegation of the petition. Before trial Bodeman's answer was withdrawn, and judgment by default entered against him. There is no contest as to the fact that the goods were worth the amount charged, nor that they were furnished for the use of the boat, on the order of the proper officers, nor as to the liability of defendants Bodeman and McPherson. The controversy is wholly as to the liability of defendant Erfort.

It appeared in evidence that defendant Erfort was a member of the firm of Erfort & Pietring, which firm had directed defendant McPherson to purchase the 'Kate Kearney,' at public sale, at a price not to exceed $2,500. McPherson, who had only $500 of his own money, bought her in for $3,750, in his own name, and paid his $500 on his bid. Erfort & Pietring refused to have anything to do with her at that price, but, finally, Erfort alone, being unwilling that McPherson should lose the $500 advanced by him on his

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bid, paid the balance of the purchase money by indorsing notes of McPherson, which Erfort afterwards paid. The boat was then sent to the docks for repairs, and, whilst she was on the ways, Bodeman asked McPherson if he could buy an interest in her. McPherson referred him to Erfort, who sold Bodeman a one-third interest in the boat for $2,500, which Erfort then received on account of the amount for which he was liable on the McPherson notes indorsed by him.

When the boat came off the ways she was at once made ready for a trip to New Orleans, with the assent of all three defendants. McPherson was captain and Bodeman clerk, though Erfort swears that Bodeman knew little or nothing about steamboat business or accounts, and Bodeman swears he made all entries on the books by McPherson's directions. The dock bill was presented to Erfort.

It was originally $9,000, but he got it reduced to $8,279.25, which Erfort paid, taking an assignment of the hull policy.

He also advanced $500 for current expenses of the boat, and paid $450 to discharge a debt she owed. The bill of sale for the boat was, by Erfort's direction, taken to McPherson and Bodeman, and she was enrolled at the custom house in their name. Erfort swears that he was not interested in the boat, but intended to take a mortgage on her, to secure his advance; but this was not done. William Bodeman swears that Erfort told him he had an interest in the boat, and defendant Bodeman swears that they were joint owners, each owning one-third, by agreement. McPherson corroborated Erfort's testimony as to ownership. The boat made one trip to New Orleans, returned to Cairo, and was sunk on her return from Cairo to New Orleans. The freight insurance was to have been given to the creditors, but McPherson collected and pocketed it. Erfort requested Bodeman to show him how the boat stood, and Bodeman swears he made out a written statement of her affairs, in

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which he put down each of the defendants as partners to the amount of one-third; that he handed this to Erfort, who took no exception to it. Bodeman also swears that it was distinctly understood from the first, and all through, that the defendants owned the boat together in equal shares, and were to have each one-third of her profits as partners in the adventure, and, as to this, the record has this admission: "On cross-examination, defendant Erfort, in reply to repeated questions whether he would swear that there was not any understanding between him and Bodeman, at the interview between Bodeman and Erfort, to the effect that Bodeman was to be interested to the extent of one-third, and Erfort to the extent of one-third, in the boat, Erfort said that he would not undertake to swear positively that there was no such understanding." The hull policy was collected by Erfort, and applied by him towards repayment of his advances for the boat.

There was a verdict and judgment against all the defendants, and a motion for a new trial having been overruled, and all exceptions being duly saved, defendant Erfort brings the case here by appeal.

Defendant asked the court to instruct the jury that, on the evidence, the plaintiff was not entitled to recover against Erfort. Also, second, that, to find for plaintiff against Erfort, the jury must find from the evidence that, at the date of plaintiff's account, Erfort owned an interest in the boat, and was duly registered as such owner, or that he had chartered a share of her, and that the supplies in question were furnished on Erfort's credit as such owner or charterer. Also, third, that, if the boat was purchased by McPherson without Erfort's authority; that, to enable McPherson to complete the purchase, Erfort loaned him, or became responsible to pay for him, $3,200; that McPherson then sold Bodeman an interest in the boat, for which Bodeman gave Erfort $2,500, as part payment of the money previously advanced by Erfort to McPherson, or for which Erfort had

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become liable; that the paper title was then conveyed to Bodeman and McPherson, one-half to each; that then, and solely to accommodate them and enable them to start running the boat, Erfort loaned them, on the boat, $500, and became responsible for the dock bill, receiving the insurance on the boat as security; that Erfort, to accommodate McPherson and Bodeman, paid out on account of, or became responsible for, specified claims against the boat, and that Erfort never had any interest in the boat as owner, or in its profits and losses, no recovery can be had against Erfort herein. Fourth, that the facts of Erfort's interest in the profits and losses of the boat, or in running the boat, must be proved, and can only be proved by showing an agreement between himself and Bodeman and McPherson to that effect.

These instructions were refused, and defendant Erfort excepted.

The following instructions were then given by the court, at the instance of plaintiff, and to the giving these instructions defendant excepted:

1. "The jury are instructed that the bill of sale read in evidence does not settle or decide the title to the boat, but it is for the jury to say, from all the evidence in this case, what relation the defendants occupied towards the boat, and in whom the ownership or interest really was. It is not necessary for plaintiffs, in order to make out their case, to show that any written instrument was executed, or any particular form gone through with."

2. "If the jury believe from the evidence that Erfort was really a part owner, engaged with the other part owners of the boat in fitting her out and running her, he is liable in the same manner as if he had acknowledged himself to be such part owner; but the jury are instructed that it is not essential, in order to render Erfort liable, that he should have been a part owner. If he was interested in getting out the boat and running her, so that if profits were made

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he was to share those profits, no matter in what proportion, with McPherson and Bodeman, then, though Erfort was not to be known to outsiders or third persons as interested, he is liable in the same manner as if he had been acknowledged part owner, engaged with the others in running the boat for their joint benefit."

3. "If the jury believe that there was an agreement or understanding among the defendants that the boat should be got out and run for their common benefit and profit, and that she was fitted out and run under such an agreement or understanding, then, so far as third parties, such as the plaintiffs, are concerned, this made the defendants partners, and made all of them liable as such."

The court gave the following instruction, at the instance of defendant.

1. "The court instructs the jury that the burden of proof in this case, as against the defendant Erfort, is upon the plaintiff, and that, before they can find against said Erfort, they must be satisfied, from all the evidence, that, at the dates stated in the petition, he was in fact part owner of the 'Kate Kearney,' or interested in running said boat for profits; and if the jury believe from the evidence that said boat was purchased by defendant McPherson for $3,750; that, to enable him to complete such purchase, defendant Erfort loaned or became liable for, and afterwards paid for, said McPherson, $3,200, and that the $2,500 given by defendant Bodeman to said Erfort, when said Bodeman acquired an interest in said boat, was received and paid on account of the money previously advanced by said Erfort to said McPherson to pay for said boat; that the moneys subsequently laid out by said Erfort for said boat, and indorsements and guaranties given for it by him, were given for the accommodation of the defendants McPherson and Bodeman, and as loans to them on the boat, and not as part owner or one interested in the earnings thereof, then the jury will find for the defendant Erfort, provided they also

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believe from the evidence that there was no agreement between McPherson, Bodeman, and Erfort that said Erfort should share in the profits or losses of the boat."

It is claimed by the plaintiff that the evidence shows that defendant Erfort was, first, interested in the profits of the boat; second, a copartner with his co-defendants in running her; and, third, a part owner of the boat; and that the proof of either one of these three propositions is enough to establish his liability. Defendant, on the other hand, insists:

1. That the registered owner is the sole legal owner of a boat.

2. That a man can be charged in respect of property in a ship only either on credit given to him as legal owner, or by having held himself out as such, and cannot be held as secret part owner unless credit is given to him directly.

It is a little singular, in view of these positions of defendant, that, in his third instruction refused, he himself seems to submit the question of Erfort's interest in the profits and losses of the boat as decisive of his liability.

There is abundant evidence from which the jury could find Erfort both a partner in running the boat, and interested in the profits, and that wholly outside of the question as to whether, in view of the decision in *Campbell* v. *Dent*, an agreement between parties to that effect is necessary to make them, in this State, partners as to those having dealings with them. There is evidence that there was an understanding and agreement between defendants that Erfort was a partner, and had that issue been found by a jury in favor of plaintiffs, the verdict could not, in this case, have been set aside as wholly unsupported by evidence, however minds may differ as to the preponderance of it. There is, also, evidence enough that Erfort had, by agreement, one-third of the profits, and, also, that he was part owner, if he could be part owner whilst the boat was enrolled in the name of Bodeman and McPherson alone, and we hold that, undoubtedly, he could.

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Neither register nor enrollment, nor even a bill of sale, are necessary as muniments of title in question between parties, not affecting the privileges of the vessel.

The register itself is not of itself evidence of property, unless it be shown directly or circumstantially that it was made by the authority or assent of the party who is sought to be affected by it. With proof of such assent or authority it is evidence, though not, even then, conclusive. The defendant seeks to give a construction to the registry laws of the United States which they will not bear, and which they were never intended to receive, and his citation of English cases in support of his position does not sustain his views. In *Harrington* v. *Fry*, 2 Bing. 180, the defendant had nothing whatever to do with the management of the vessel, nor had he been consulted about her, nor derived profit from her; and in *Trewhella* v. *Rowe*, 11 East, 435, the ship-owner, after ordering supplies, conveys the vessel to a third party, whom the material man seeks to charge, but he is discharged on the ground that the party liable is the man who owned the ship when the supplies were ordered.

The case did not turn on the registration of the vessel; there was no evidence at all that he was owner. Pars. on Ship. & Ad. 1, 5, 129; *Duff* v. *Bayard*, 4 Watts. & S. (Penn.) 240; 7 Wall. 646.

The registry laws are not intended as a contrivance to enable a rogue, by covering up his title, to cheat his creditors, and they would be so if they could be interpreted as defendant in this case insists. These acts have nothing to do with the personal liability of the owners in a case such as presented by this record.

A ship, like any other article of property, may be owned by one person, or by several persons in common.

In the latter case they are called part owners. They are not by such ownership, nor by a division of its freight or earnings, thereby made partners; though a ship, like any other valuable, may constitute part of partnership stock,

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and then the owners are not properly part owners, but partners.

So it is in regard to all other property.

The question as to who might happen to be the registered owner, or even the legal owner, of the boat, is not necessarily decisive of this case.

To quote the language of Judge Sergeant, in *Duff* v. *Bayard*, 4 Watts & S. (Penn.) 249: "That the owners of a vessel are liable for supplies or necessaries furnished for her use by the order of the master, when no other person has been expressly credited, is a principle long established. But who is such owner, in any given case, is a question on which there are to be found contradictory cases and fluctuating opinions in the reports. The later decisions seem, however, to agree that one having the legal title only, without any interference in the management of the ship, or any right to receive her freight or earnings, is not responsible, whether the title is by a bill of sale or other sufficient conveyance, or whether it is by a mortgage or other document in the nature of a pledge or other security. Such persons are, it is true, in one sense owners—that is to say, they have a valid claim or title to the property of the vessel, either in law or in equity. But that is not sufficient.

"The owner who is responsible in such cases is the person who, having some kind of claim or title, has the control and management of the vessel, and has a right to receive her freight and earnings. And the ground of this liability seems to be the common maxim, *qui sentit commodum, sentire debet et onus*, it being obviously right and just that he who enjoys the benefits of a vessel and controls her operations, who receives her gains, or has a chance of so doing, ought to pay debts incurred for the fitting out, supply, or navigation of the vessel which is to produce for him those earnings, and not a person who merely owns a right in her without the profit or usufruct. It is for the former of these, and not for the latter, that the master is considered as agent, and

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competent to bind them by his orders for supplies furnished to the vessel."

We have gone somewhat at length into the questions of law applicable to this case, as it seems to have been tried, on both sides, on views of the law which we regard as incorrect.

The second instruction given for plaintiff not only directs the jury that, to make Erfort liable, it is not necessary to find that he was a part owner, but goes much further, and tells them that if he was interested in the profits to any degree, although not known to outsiders to be interested, that fact alone makes him liable for supplies furnished to the boat. We know no authority that goes to such a length.

Under this instruction, if Erfort was not an owner, but had simply loaned money to the boat, and had a claim, to any extent, upon her earnings for his repayment, though these facts were known only to the owners and himself, he would, *ipso facto*, be liable for her supplies.

This, we conceive, is not the law. For the error in giving this instruction the judgment of the Circuit Court must be reversed, and, the other judges concurring, it is reversed and the cause remanded.

GEORGE BALDWIN *et al.*, Plaintiff in Error, *v.* ELLIOTT T. MERRICK, Defendant in Error.

1	281
44	365
1	281
59	658
1	281
68	611

February 28, 1876.

A furnace not fastened down, but set upon a stand of brick-work, and which could be carried out without disturbing the ceiling, walls, or floor of the house, even though a fixture as between vendor and vendee, is not a fixture within the meaning of the mechanics' lien law.

ERROR to St. Louis Circuit Court.
Affirmed.

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Hills & McKeag, for plaintiffs in error, cited: Pitman v. Ross, 46 Mo. 337; Oster v. Rabeneau, 46 Mo. 595; Cohen v. Kyler, 27 Mo. 122; Rogers v. Crow, 40 Mo. 91; Bircher v. Parker, 43 Mo. 443; Blithe v. Fowle, 40 Me. 310; Main v. Schwarzwalden, 4 E. D. Smith (N. Y.); Teaffe v. Hewitt, 1 Ohio, 511.

George Denison, for defendant in error, cited: Chitty on Con. (11th Am. ed.) 499.

BAKEWELL, J., delivered the opinion of the court.

Plaintiff sues to recover for work and labor and materials in putting a furnace into defendant's house; he also seeks to enforce a mechanic's lien against the premises described in the petition. The Circuit Court rendered a general judgment against defendant, but refused to render a special judgment against the property described. This is assigned as error, and the case is brought here by plaintiff on writ of error.

It was admitted that plaintiff is entitled to a lien if the work and material were of that character for the doing and furnishing of which a lien is given by the statute. The language of the act is: "Every mechanic or other person who shall do any work upon, or furnish any materials, fixtures, engine, boiler, or machinery for, any building, erection, or improvements upon land, or for repairing the same," etc.

The evidence in the case was as follows:

George Baldwin testified that the furnace mentioned in the account was placed in the cellar of defendant for the purpose of consuming coal to heat the house, which is a dwelling-house. It was builded in or upon a base of brick, fire-clay, mortar, etc., all of which was let into the floor several inches, which base had been previously built for the former furnace, and this furnace was placed upon the old foundation already there, and incased with bricks and mortar built around it from the old foundation, sufficient to keep it there securely. For the purpose of placing it there it was

necessary to put it in three sections, and cement each section with fire-clay. As it was put on, the furnace weighed about 1,500 pounds; the pipes, except short connection and one short pipe in the cellar, were all old pipe, and used with the old furnace, and not furnished by plaintiff, and extended from the furnace to all the rooms in the house, through the walls, and were attached to registers which were nailed to the floor. It might be lifted up by men, if they had physical force sufficient, and, if taken away, would not be missed more than an ordinary stove.

Elliott T. Merrick swore that, when the house was built, it was built generally to be heated by a furnace, and one was put there, but was burned out, and Baldwin replaced it by the one in controversy, which witness had put there to remain until it would get burned out. The house might be made habitable by using grates or stoves.

This was all the evidence in the case.

It is authoritatively declared to be the settled policy in this State to secure mechanics and material men by giving them a lien on the property they have contributed to improve or create, and in interpreting the mechanics' lien law to avoid unfriendly strictness and mere technicality. *Putnam* v. *Ross*, 46 Mo. 338. Where the law gives a lien to mechanics, laborers, and material men, that lien must not be defeated for a mere technicality, but it is not the intention of the court, or the policy of the law, to extend the provisions of the law to cases not within its purview.

The simple question here is: Was the furnace in question a fixture within the meaning of the act?

There are two widely differing rules as to fixtures. A very lax one, as between lessor and lessee, making nothing a fixture not integral to a house, and a very strict one, as between vendor and vendee, making almost everything a fixture which is in any way made stationary about it.

Air-tight stoves standing where used for warming the house, portable cupboards, a wooden cistern on blocks in

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the cellar, stoves, grates, kitchen ranges, and even hoop-poles, stuck in the ground during the previous season, but, at the time of the sale, taken down and stacked in heaps, have been held to be fixtures, as between vendor and vendee, and mortgagor and mortgagee. *Colegrave* v. *Dias Santos*, 2 B. & C. 76; *Bishop* v. *Bishop*, 1 Kern. (N. Y.) 123; 40 Me. 311. Yet no one would maintain that a stove man could have a lien for an ordinary air-tight stove.

In *Rogers* v. *Crow*, 40 Mo. 91, an organ was held to be a fixture, as between mortgagor and mortgagee, on the sale of a church; but, in that case, the organ was attached to the floor, intended to be permanent, and was required to complete the design and finish the building, and was fixed in a recess expressly made to receive it when the church was built.

In *Main* v. *Schwartzwaelder*, 4 E. D. Smith (N. Y.), 273, a furnace was held to be a fixture; but this was also a case of vendor and vendee, and the furnace was so placed that it could not be displaced without disturbing the brick-work of the adjoining wall, and endangering the ceiling.

The furnace in the case before us was not attached to the floor. It weighed 1,500 pounds, but was not fastened down, but merely incased with brick and mortar upon a platform of brick-work which was there before the furnace was put into the house, and had been used formerly as a stand for a similar heater. The pipes running through the house were no part of this furnace, and were in place before it came, and used for the old heater. Any power of sufficient strength could have lifted the furnace from the brick flooring on which it was placed, and carried it bodily out of the house without disturbing the walls, the ceiling, or the floor of the house itself. As between vendor and vendee, it would, perhaps, have been a fixture; as between lessor and lessee, it would not. We do not think it was a fixture within the meaning of the law giving a lien to mechanics; and we hardly think that any straightforward, intelligent

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mechanic would have imagined, in placing it there, that he had a lien upon the building in which it was placed, and the lot on which that house was erected, for its payment.

The policy of the law is to secure the classes of persons named in the act, upon a substantial compliance with its provisions on their part, without unfriendly strictness in scrutinizing the enforcement of the remedy where it is clearly given. But it is not the policy of the law to extend the scope of the act so as to include classes of manufacturers and traders not entitled to its benefits, to give a lien to a stove dealer because a stove has been called a fixture for some purposes of the law, or to say that any shelving, fastened to the wall with nails, is a fixture because it has been sometimes said that anything affixed to the house, under certain circumstances, becomes so.

The judgment of the Circuit Court is affirmed. The other judges concur.

MATTHIAS SCHULTER *et al.*, Respondents, *v.* THE AMERICAN CENTRAL INSURANCE COMPANY, Appellant.

February 28, 1876.

Where there is no question of fraud, it is not error to refuse to instruct the jury in a suit on a policy of fire insurance, that the matters sworn to by the assured in his examination by the agent of the company, after the fire, according to the provisions of the policy, were presumptively true for the purposes of the case at bar.

APPEAL from St. Louis Circuit Court.

Affirmed.

Rankin & Hayden, for appellant, cited: Hoffman *v.* Western Mutual Ins. Co., 1 La. An. 216.

E. Peacock and *Cline, Jamison & Day*, for respondents, cited: Marion *v.* Ins. Co., 35 Mo. 148; Wells *v.* Halpin, 59 Mo. 93.

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Bakewell, J., delivered the opinion of the court.

Plaintiffs sue to recover the amount of a policy of insurance covering their stock in trade, being wines and liquors.

The answer admits the insurance, and, after denying the other material allegations in the petition, alleges that the greater part of the goods insured were abstracted and disposed of in such a manner as not to be consumed or injured in a way to make defendant responsible. On the trial the plaintiffs offered evidence tending to show that the whisky in question had been destroyed by an accidental fire; that the heat was excessive; that a considerable number of the barrels in the first and second stories were totally destroyed, and that the missing whisky, in the barrels that remained, evaporated, or was otherwise destroyed by fire. Defendant admitted, on the trial, that the fire had occurred at the time and under the circumstances alleged, and that a considerable portion of the goods had been destroyed by fire, defendant contending only that a large quantity of whisky, which the plaintiffs claimed had been destroyed by fire, was not so destroyed, but that this part of the stock, amounting to several thousand dollars in value, had been, as alleged in the amended answer, abstracted and removed before the fire took place; and defendant introduced evidence tending to prove these facts. It appeared that, just after the fire, Dewey, an agent of the insurance company, had visited the premises with Schroeder, the husband of a woman beneficially interested in the property, and whose trustee is one of the plaintiffs, and Schulter, the other plaintiff, was with them. These three men, from the appearance of things, came to the conclusion amongst themselves that some one had, just before the fire, entered the store, removed or poured on the floor a large portion of the liquors, and then fired the store. Upon Dewey telling Schroeder and Schulter that he wanted their affidavits, under that clause of the policy which provided for statements or examinations of the assured after a loss, they made certain

affidavits, which were offered in evidence by the defendant on the trial.

The affidavit of Schulter, so far as it relates to the loss, is in these words: "I visited the store first, after the fire, Monday morning, 20th inst., between eight and nine o'clock. I entered the store, and I then discovered that the bungs were out of most of the barrels. These bungs were in the barrels when I left the store on Saturday. I think the store was set on fire. I believe that some person unknown to me took the hose and drew the liquor from the barrels, permitting it to run on the floor. We kept hose in the store for the purpose of drawing liquor out of the barrels. The barrels were all in the right position, the same as usual, with the bung-holes up, on Monday morning, with some exceptions. It would have been impossible for the liquor to get out, if not drawn out, in the position we found the barrels."

Both Schroeder and Schulter were examined as witnesses, on the trial, and gave evidence tending to contradict these statements in the affidavit of Schulter and similar statements in the affidavits of Schroeder. They swore that they did not read the affidavits before swearing to them, and that these affidavits, in some respects, were incorrect statements of what they had said to Dewey; that Dewey reduced their statements to writing; that the statements made to Dewey were in the form of questions and answers, and that Dewey had reduced them to narrative form, and interpolated into the affidavits things they had not said. Dewey swore that the affidavits were correct statements of the answers of Schroeder and Schulter, though not word for word what they said; that both affidavits were read to the affiants before they were signed and sworn to by them.

The defendant asked the following instruction, which was refused:

"The jury are instructed that, by the terms of the policy offered in evidence, it is provided and made one of the conditions thereof that the assured shall, if required, sub-

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mit to an examination or examinations, under oath, by any person appointed by the company, and subscribe to such examinations when reduced to writing. If the jury believe from the evidence that the witness Dewey was by the defendant, under the provision of the policy, appointed to take the examinations, under oath, of the plaintiff Schulter, and so told Schulter, at the time, he was so taking his examination under said provision, and that, in the examinations taken, said Schulter stated and made oath to certain material matters, then the matters so made oath to by said Schulter are presumptively true and correct for the purposes of the present case, and the burden is on the plaintiffs to show they are incorrect and not founded in fact."

To the action of the court in refusing this instruction defendant excepted.

There was a verdict and judgment for plaintiffs for the whole amount claimed, and, a motion for new trial having been overruled, and all exceptions saved, the case is brought to this court by appeal.

The only error complained of by appellant is the refusal of the instruction just set forth.

We see no error in the refusal of this instruction.

The affidavit of Schulter was in evidence, and it was for the jury to pass upon the whole evidence in the case. The burden of proof was on the plaintiffs, and the court so declared to the jury, in the instructions given at the instance of defendant.

In *Hoffman* v. *Western Marine and Fire Insurance Company*, 1 La. An. 216, it was held, in an action on a policy of fire insurance, providing for forfeiture of all claims in case of false swearing by the assured, that, in case of a difference between the losses sworn to by the assured in his affidavit, and the amount proved on trial, it was for the plaintiff to show that this difference was the result of error and not of fraud; but there the plaintiff was charged with setting fire to the building. In the case before us there is no charge of fraud

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in the pleadings, and nothing in the evidence to warrant such a suspicion. It was for the jury to pass upon the weight of the evidence, and it was not error for the trial court to refuse to single out this affidavit and tell the jury that it created a presumption in favor of defendant. As a comment upon a particular portion of the evidence, such an instruction would have had a tendency to mislead. *Jones* v. *Jones*, 57 Mo. 138.

It might well be that Schulter, on entering his store after this fire, from the appearance of things, formed a hasty opinion that the bungs had been maliciously removed from the barrels and the whisky extracted; and that afterwards, on investigation, he became convinced that the bungs were forced out, and that the liquor escaped by the effect of the intense heat. The whole testimony is not set out in the record. But it appears that the jury were satisfied from the evidence that the liquor was all there when the store burned. They were the judges of the facts, and the affidavit of Schulter was one element in the case properly submitted to their consideration. It was no error in the trial court to refuse to declare to the jury that the matters stated in it were presumptively correct. The judgment of the Circuit Court is affirmed. The other judges concur.

ADIAL R. NEWCOMB *et al.*, Respondents, *v.* DAVID BLAKELY, JR., *et al.*, Appellants.

February 28, 1876.

1. An assignment of a chose in action to a creditor, expressed to be to secure the indebtedness due, and interest up to a future date, is not an extension of time which will release the sureties of the debtor.

2. Sureties will not be released unless the alleged extension of time is made by a binding agreement between the debtor and creditor, based on a consideration sufficient to support a contract.

APPEAL from the St. Louis Circuit Court.

Affirmed.

J. H. Wieting, for appellant, cited: Rucker *v.* Robinson, 38 Mo. 154; Armstead *v.* Wood, 1 Patt. & H. (Va.) 504; Brooks *v.* Wright, 13 Allen (Mass.), 72; Smarr *v.* Schmitter, 38 Mo. 478; Weller *v.* Ransac, 34 Mo. 362.

Taylor & Whitney, for respondent, cited: McKean *v.* Citizen R. R. Co., 42 Mo. 79; Riney *v.* Valandingham, 9 Mo. 816; State *v.* Dorman, 11 Mo. 635; Mooney *v.* Kennett, 19 Mo. 551; State *v.* Connell, 49 Mo. 282; Allen *v.* Phelps, 4 Cal. 259; People *v.* Levison, 16 Cal. 100; Garneau *v.* Herthel, 15 Mo. 191, 278; Eversole *v.* Miller, 18 Mo. 120; Ford *v.* Beard, 31 Mo. 461; Rucker *et al.* *v.* Robinson, *et al.*, 38 Mo. 157; Wiley *v.* Hight, 39 Mo. 130; Headlee, Admr. *v.* Jones, 43 Mo. 235; Orme *v.* Young, Halbs. N. P. C. 84; Nichols *v.* Morris, B. & Ad. 41; Adville *v.* Glendening, 7 Taun. 126; Blackstone Bank *v.* Hill, 10 Pick. (Mass.) 132; Fulton *v.* Mathews, 15 Johns. 433; Rabe *v.* Wells, 3 Cal. 151; Gale *v.* Pearson, 6 Mo. 253; Martin *v.* Hagan, 8 Mo. 505; Hoyt *v.* Williams, 41 Mo. 270; Clayton *v.* West, 2 Cal. 382; Bellesime *v.* McCoy, 1 Mo. 18; Chouteau *v.* Uhrig, 10 Mo. 62; Walter *v.* Catchcart, 18 Mo. 256.

Bakewell, J., delivered the opinion of the court.

This appeal is presented by defendants George M. and William S. Stewart, who are sued as sureties on the bond of defendant Blakely.

It appears that plaintiffs were general agents of the American Life Insurance Company, and entered into a written contract with defendant Blakely, as sub-agent, whereby, in consideration of certain commissions he was to receive, an advance of $250 on the execution of such agreement, and a further advance of $150 in sixty days thereafter, he agreed to work for plaintiffs, as sub-agent, for two years, and to refund to them the $400 thus advanced, in monthly installments of $40 each, beginning with the third month after the date of such agreement. On the back of this agreement is a bond with a penalty of $1,500, whereby

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defendants bind themselves that Blakely shall keep this agreement in all respects. Plaintiffs advanced the $400. Blakely, when he had received the money, left them, and went to work for another company. He never returned to plaintiffs the money advanced. Afterwards, he proposed to assign to plaintiffs a part of the money he expected to receive from the United States for services in taking the census. To effect this object, an instrument was signed and sealed and delivered by Blakely to the plaintiffs, dated May 28, 1870, and which has the following clause: "This assignment is made to secure the said A. R. and C. M. Newcomb for an indebtedness, in the sum of $458, due them as advance made me under a contract between myself and said A. R. and C. M. Newcomb, dated November 24, 1869, and as the interest on the same to August 24, 1870."

Defendants claim that an extension of time was given by plaintiffs to Blakely, and that the sureties were thereby discharged.

It appears that the sum of $458 mentioned in the assignment was made up of the $400 advanced, some small sums due by Blakely, and interest on the whole up to August 24, 1870; and that the Stewarts knew nothing of the assignment till it was completed. Blakely swears that he proposed to give this assignment to plaintiffs on condition that they would release his sureties, and that they promised him, in consideration of the assignment, that they would not sue till August 24th. This is contradicted by both the plaintiffs, who swear that they refused to give time, declared they would do nothing to release the sureties, and refused to take the assignment until their lawyer had prepared the form, and assured them that it would not release these sureties nor give time to Blakely. Their testimony as to refusing to give time is corroborated by their clerk.

There was a verdict and judgment for plaintiffs.

The court, at the instance of plaintiffs, granted the following instructions:

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"The court declares the law to be that, if it finds from the evidence that plaintiff advanced to defendant Blakely the $400 alleged, and that the same was not repaid to plaintiffs, or any part thereof, then the plaintiffs should recover in their action against Stewart & Stewart, unless the court finds from the evidence that there was an agreement, based on a consideration, between the plaintiffs and the defendant Blakely, by which plaintiffs bound and obligated themselves to grant unto said Blakely an extension of time for the repayment of said $400, as claimed by defendants in their amended answer.

"The court further declares the law to be that the effect of said assignment set out in defendant's answer, of itself, does not amount to an agreement for an extension of time, and the court should not find that there was an agreement to such extension of time unless it believes from the evidence *aliunde* that there was a positive agreement to that effect, of such binding force as to prevent plaintiffs herein from maintaining this action before August 24th."

The following instructions were asked by defendants and were refused:

"Unless the court, sitting as a jury, finds from the evidence in this case that there was an express agreement to the contrary, the fact that the plaintiffs received the assignment from defendants on May 28, 1870, as collateral security for the amount to be due on the bond sued on in this case on August 24, 1870, operated as a discharge of the securities on the bond, unless the court further finds from the evidence that the securities, or either of them, assented to such assignment, either before or after the date of such assignment.

"If the court, sitting as a jury, finds from the evidence that the assignment set out in defendant's answer was made to recover, not only the amount of money which the said Blakely was owing plaintiffs at the time of the execution of said assignment, but also included interest on said amount up to August 24, 1870, then the court will declare that the

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effect of said assignment, in law, was to postpone the collection of said money until said last-named date, and to prevent plaintiffs from suing said Blakely for said sum of money before that date, unless the court further finds that there was an express agreement that the assignment should not operate as extending such time."

In order to justify a verdict in their favor in this case, it was necessary for defendants to show some binding contract, made by plaintiffs, obliging them to refrain from suing Blakely, at least for a time.

There was, therefore, not only evidence to sustain the verdict herein, but it would have hardly been possible for an honest and intelligent jury to have found otherwise than they did. It is urged, however, that the court erred in granting and refusing instructions; and, on this ground, we are asked to reverse the case.

To the first instruction granted for plaintiffs it is objected that it does not require the jury to find, as facts in the case, that there was any breach of contract by Blakely, or any agreement to repay. As to these points there was, however, no controversy on the trial, whatever the pleadings might allege; and the instruction could not be misunderstood by the jury, and, therefore, could not prejudice defendants.

It is earnestly insisted that the effect of the second instruction for plaintiffs is to take altogether from the consideration of the jury the assignments offered in evidence, as not tending in any degree to show an agreement to extend time. It is argued that the fact of the sum mentioned therein including interest to August in advance was a fact which the jury should have been allowed to consider, as tending to corroborate any other testimony in the case looking to a binding agreement to extend time. We do not think that this instruction was liable to be understood in a way to prejudice the defendants. The assignment was certainly no agreement to extend the time,

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and, if there was any such agreement, it must be found *aliunde*, for it clearly is not there. The instructions refused, asked by defendants, are a declaration that this assignment operated as a discharge of the sureties, unless made with their consent. There is nothing in the assignment which, by any construction, can be tortured into an extension of time. We therefore think that there was no error, in the giving or refusing of instructions, to warrant a reversal of the judgment. And we see no such error, anywhere in the record, as in our judgment could prejudice defendants or materially affect the merit of the case. The judgment of the Circuit Court is affirmed. The other judges concur.

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IN THE MATTER OF THE ESTATE OF D. D. ST. VRAIN.

February 28, 1876.

Where children of an intestate, who have received advancements, refuse to come into hotchpot, they are to be disregarded in making an order of distribution of the estate descended.

APPEAL from St. Louis Circuit Court.

Affirmed.

Gottschalk, for appellant, cited: Wag. Stat. 530, secs. 6, 7.

Samuel N. Holliday, for respondent, cited: Wag. Stat. 530, sec. 6; Wag. Stat. 529; Spradling *v.* Conway, 51 Mo. 51.

BAKEWELL, J., delivered the opinion of the court.

It appears from the record in this cause that, on final settlement in the Probate Court of St. Louis county, of the estate of Domitille D. St. Vrain, deceased, a balance was found in the hands of the administrator, belonging to said estate, of $1,584.17 for distribution; whereupon the following order of distribution was made by said court:

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"It appearing to the court that Charles Leon St. Vrain is the only child and heir of said deceased who received no advancement from him, and that all the remaining children and heirs of said deceased, having received such advancements, decline and refuse to come into hotchpot, wherefore the court apportions the balance aforesaid, and orders the same to be paid and distributed by said administrator, in the manner following, to wit: To Mary St. Vrain, widow of said deceased, who has heretofore had and received of the assets of said estate the sum of $200, the further sum of $69.16, and the said Charles Leon St. Vrain the residue of said balance then remaining, to wit, the sum of $1,515.01, in addition to the sum of $100 heretofore received from said administrator."

From this judgment an appeal was taken to the Circuit Court, and, the cause being tried anew, the same order and judgment rendered in the Probate Court was given in the Circuit Court, in the words set out above. A motion in arrest of judgment and a motion for a new trial were duly filed by the administrator, which being overruled, the cause is brought here by the administrator by appeal.

It appears from the evidence in this cause that St. Vrain died in December, 1868, leaving a widow and seven children, of whom five were adults and children of a former bed. The two children of the second bed were aged, respectively, four years and one year and six months at the date of the intestate's death. In 1864, before the birth of the youngest child, deceased, being in bad health, divided his real estate, consisting of about 225 acres, equally among his children, the portion thus given to each being worth about $3,000, and one year afterwards he gave to each of his children by the first wife about $450 in cash, except to the elder, who was in Mexico, and who owed his father, then, a note for a much larger sum. The intestate gave as his reason for this action in the premises, that he did not expect to recover, and wished to divide his property himself, so as to leave

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nothing to be done after his death. The eldest child of the second marriage, named Emanuel C. St. Vrain, received his equal portion of the land, but subject to the mother's life estate. This life estate of the wife in the portion given to her then only son was all she received for relinquishing her dower in the portion given to the children of the first marriage. Charles Leon St. Vrain, the youngest son, was not in existence when the above division was made, and nothing was ever given to him. The widow and the two children are satisfied with the order, and ask that the judgment of the Circuit Court be affirmed.

The law provides (Wag. Stat. 530, sec. 6, and p. 529, sec. 1) that, where any children of the intestate shall have received in his life-time any real or personal estate, by way of advancement, such children shall take no part of the estate descended unless they bring such advancements into hotchpot with the estate descended. The Probate Court properly took into consideration these advancements, in making the order of distribution of the personalty; to have refused to do so would have been to disregard a plain provision of law. There is no merit whatever in this appeal.

The judgment of the Circuit Court is affirmed. The other judges concur.

HERMANN STAMM, Respondent, *v.* F. KUHLMANN, Appellant.

February 28, 1876.

In a suit for breach of warranty of soundness, in the sale of a horse, it must be shown that the disease existed at the date of the sale.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Samuel Erskine, for appellant, cited: Story on Sales, secs. 362, 363; Woodbury *v.* Robbins, 10 Cush. (Mass.) 520;

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Thompson *v.* Ashton, 14 Johns. 316; Bailey *v.* Forrest, 2 C. & K. 131 (Cresswell); Eaves *v.* Dixon, 2 Taun. 343; Cramer *v.* Bradshaw, 10 Johns. 343; Lindley *v.* Davis, 30 Mo. 406; Stephens *v.* Chappell, 3 Strobh. (S. C.) 80.

J. H. Mincke, for respondent.

BAKEWELL, J., delivered the opinion of the court.

This case was originally tried before a justice of the peace. On appeal, it was tried anew in the Circuit Court, where there was a verdict and judgment for the plaintiff. Defendant filed his motion for a new trial, which being overruled, defendant having duly excepted, the case is brought to this court by appeal.

It appears that defendant, on March 21, 1872, sold to plaintiff a horse which he warranted, in writing, to be sound at that date. Plaintiff says that the horse was not then sound, and that he died, April 23, 1872, of a disease which he had at the date of the sale; and he claims damages, $135, being the price paid for the horse and the money expended in attempting to cure him.

At the close of plaintiff's case defendant asked an instruction that, on the evidence, the plaintiff is not entitled to recover, which was refused. The only question in the case is whether there is any testimony to sustain the verdict.

To enable plaintiff to recover, he must show that the horse was diseased when sold. This he totally failed to do. The evidence was that the horse died of pneumonia, about twenty-eight days after the sale; but there was not a word as to his being diseased when sold. The testimony of plaintiff's witnesses, as to the disease of the horse, is the statement of plaintiff that the horse took sick and died after plaintiff had had him twenty-eight days, and that of Edward Scheele, a veterinary surgeon, who swears that the horse died of pneumonia, or dropsy of the chest, and that witness made an autopsy of the horse, and one of his lungs was gone. Plaintiff then rested his case. On behalf of

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defendant, the defendant swore that the horse was sound when sold, and this statement was fully corroborated by four witnesses, who also testified that the horse was sound, and worked well, a week or so after the sale.

The medical expert was not asked as to the shortest time within which a healthy lung might be destroyed by disease; and, in the absence of testimony, the jury had no right to infer from that fact alone that a horse that died of pneumonia, with one lung gone on April 23d, must necessarily have been diseased on March 21st. The existence of disease at the time of the sale is an essential fact in this case, and it must be shown before a recovery can be had.

The court below erred in refusing the instruction asked by defendant. There was no evidence whatever to go to the jury. The judgment of the Circuit Court is reversed and the cause remanded. The other judges concur.

JOHN B. AUBUCHON, Respondent, *v.* HENRY POHLMAN, Appellant.

February 28, 1876.

It was agreed that A's jack should be let to B's mare, and that, if a mule colt should result, B was to pay A $10; otherwise, nothing. *Held*, that this was no warranty of a mule colt; and that upon failure of such result, without fault on the part of A, B had no right of action.

APPEAL from St. Louis Circuit Court.

Reversed and dismissed.

Melville Smith, for appellant.

J. M. Loring, for respondent.

LEWIS, J., delivered the opinion of the court.

Suit was commenced before a justice of the peace, where the plaintiff filed a statement alleging that, in consideration of the sum of $10, to be paid by plaintiff to defendant, the latter agreed to let his jack have access to plaintiff's mare,

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and promised that a mule colt should be the result. That plaintiff thereupon placed his mare in the care of defendant, who afterwards returned her, saying she was "all right." That in due course of time the mare "foaled a horse colt, instead of a mule, as defendant had agreed." That plaintiff had already one mule colt, and wanted a matched pair. That the horse was of no use to him, and, by reason of defendant's violation of his promise aforesaid, "he, the plaintiff, has lost his said match," together with the mare's labor, etc., whereby he is damaged in the sum of $200. Plaintiff got a verdict and judgment for the sum claimed, whereupon defendant appealed to the Circuit Court, where a jury found for plaintiff the sum of $1.

Difficult as the courts below must have found it to discover a cause of action, with the plaintiff's statement before them, it was, doubtless, made more so by his testimony. Two juries declare that some right of the plaintiff had been violated, but in this record we fail to find out what it was. The plaintiff testified that he was to pay the defendant $10 "to insure;" but proceeded to neutralize the effect of this by explaining that he was to pay that sum at the out-come, if a mule should be the result; otherwise, nothing. It does not appear that there was any warranty, that any payment was ever made, or even tendered, by plaintiff, or that he even bound himself to pay, except in an event which did not afterwards occur. There was simply an understanding that the service to be rendered by defendant should be gratuitous if it failed of a certain effect. It was neither alleged nor proved that, by any fault of defendant, the course of nature was perverted or the plaintiff's hopes deceived. The only testimony tending that way was to the effect that the jack, upon being introduced to the mare, refused to perform the expected service. When the ultimate result brought disappointment to the plaintiff, and he thereupon paid nothing to defendant, the contract, as described by himself, was simply fulfilled on both sides: "No mule, no pay." There

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remained nothing to be sued for by either party. No testimony was offered of any loss to plaintiff of the mare's labor.

Defendant tendered to the court below seven elaborate instructions, all of which were refused. The refusal of one of them being found sufficient to demand a reversal, we need not discuss the merits of the others. That one declared that, "upon the evidence, the plaintiff cannot recover in this action." It contained the whole law of the case, and should have been given. For this error the judgment is reversed and the suit is here dismissed. The other judges concur.

JOSEPH, *alias* JOACHIM, GATERMAN *et al.*, Appellants, *v.* AMERICAN LIFE INSURANCE COMPANY, Respondent.

February 28, 1876.

By a policy of insurance, dated March 5, 1870, on the life of Joachim Gaterman, he was to pay $70 on the day of its issue, and a like sum annually for ten years; in consideration whereof the insurance company agreed to pay to him, should he be alive in 1896, or, if he were then dead, to his son, $1,000. It was provided that a failure to pay any of the annual premiums should avoid the policy. The assured died on March 11, 1873, the premium due on March 5, 1873, being unpaid. It was tendered on the 7th of March, but the assured being then notoriously moribund, it was refused. *Held*, that the forfeiture was beyond remedy.

APPEAL from St. Louis Circuit Court.

Affirmed.

Slayback & Haeussler, for appellants, cited: Young *v.* Mutual Ins. Co. of N. Y., 2 Ins. L. J. 289; City of Carondelet *v.* Herman Wolfert, 39 Mo. 305–308; Taylor *v.* City of Carondelet, 22 Mo. 105; Graham *v.* City of Carondelet, 33 Mo. 262; Willard's Eq. Jur. 78–83; Thompson *v.* St. Louis Mutual Ins. Co., 52 Mo. 470; Buckbee *v.* United States Ins. Co., 18 Barb. 541; Helme *v.* Philadelphia Life

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Ins. Co., 61 Penn. St. 107; Ruse *v.* Mutual Benefit Life Ins. Co., 26 Barb. 556; Hayward *v.* National Ins. Co., 52 Mo. 181; Hutchinson *v.* Western Ins. Co., 21 Mo. 97; Garnhart *v.* Finney, 40 Mo. 460; Pier *v.* Heinrichoffen *et al.*, 52 Mo. 336; Horwitz *v.* Equitable Ins. Co., 40 Mo. 557; Franklin *v.* Atlantic Fire Ins. Co., 42 Mo. 456; Combs *v.* Hannibal Savings, etc., Co., 43 Mo. 148; Northup *v.* Mississippi Valley Ins. Co., 47 Mo. 434; Moore *v.* The Mayor, etc., 45 Mo. 205; Frolich *v.* Atlas Ins. Co., 47 Mo. 406; 18 Barb. 541; 26 Barb. 556; 25 Conn. 242; 25 Conn. 207; May on Ins., sec. 342; 2 Ins. L. J. 120; Fried *v.* The Royal Ins. Co., Court of App. of N. Y. (decision rendered Nov. 11, 1872); 44 Penn. St. 263; 26 Iowa, 9–54, note; 3 Cow. 79; 29 Barb. 312, 314; 25 Barb. 189; 7 R. I. 502–506; 17 Iowa, 276–288; Krum *v.* Home Mutual Ins. Co., 42 Mo. 38; McAllister *v.* The New England Mutual Life Ins. Co., 101 Mass. 558; St. Louis Ins. Co. *v.* Kyle, 11 Mo. 291; 25 Wend. 375; 1 Ph. on Ins. 422; 20 Pick. (Mass.) 389; 16 Wend. 401; 11 Johns. 241; 1 Cush. (Mass.) 257–265; 9 Johns. 192; 6 Cow. 404; 6 Har. & J. (Md.) 408; 3 Gill (Md.), 176; 1 Sumn. 437–440; Craighead *v.* Wells, 21 Mo. 405; Phillips *v.* Protection Ins. Co., 14 Mo. 234; Noonan *v.* Hartford Fire Ins. Co., 21 Mo. 90; Ang. on Ins., sec. 244, p. 265; St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278; Pilkington *v.* National Ins. Co., 55 Mo. 173; Illinois Mutual Ins. Co. *v.* Stanton, 2 Ins. L. J. 29; Taylor *v.* Merchants' Fire Ins. Co., 9 How. 300; Ayres *v.* Hartford Ins. Co., 17 Iowa, 176; Boyd *v.* Talbert, 12 Ohio, 212–214; Smith *v.* Whitbeck, 13 Ohio St. 471; Mutual Benevolent Life Ins. Co. *v.* French, 2 Cin. Sup. Ct. Rep. 321; May on Ins., secs. 342, 361, 503, 505; 2 Story Eq. Jur., secs. 742, 750, 1319, 1323; Markey *v.* Mutual Benevolent Ins. Co., 103 Mass. 78; 1 Dill. 449; 11 Wall. 356; 26 Iowa, 9; 12 Mich. 202; Sims *v.* State Ins. Co. of Hannibal, 47 Mo. 54; Wolf *v.* Howes, 20 N. Y. 201; Broom's Leg. Max. 238–248; 3 Hill. 570; 12 Wend.

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590; 5 Den. (N. Y.) 596; 23 Wend. 306; 29 N. Y. 115; 8 Cow. 297; 19 Wend. 500; 6 Hill. 558; 52 Barb. 43, 44; 44 Barb. 64; 6 Johns. 160; 14 Wend. 215; Chisholm *v.* National Life Ins. Co., 52 Mo. 217.

Martin & Lackland, for respondent, cited: Rev. Stat. 1865, ch. 165, sec. 42; Mueller *v.* Ins. Co., 42 Mo. 85; Campbell *v.* American P—— Life Ins. Co., 2 Big. 16; Oakley *v.* Morton, 11 N. Y. 25; Horley *v.* Block, 27 How. (N. Y.) Pr. 97; Wolf *v.* Howes, 24 Barb. 174, 666; Faby *v.* North, 19 Barb. 341; Jones *v.* Judd, 4 Const. S. C. 411; Griswold *v.* National Ins. Co., 3 Cow. 96; Cable *v.* McDaniel, 33 Mo. 363; Adams *v.* Trigg, 37 Mo. 141; Darrett *v.* Dunnelly, 38 Mo. 492; Helm *v.* Philadelphia Ins. Co., 61 Penn. 107; Howell *v.* Knickerbocker, 44 N. Y. 276; Donald *v.* Piedmont and Arlington Life Co., 4 Big. 466; Broom's Leg. Max. (6th Am. ed.) 178, 179; Wadsworth *v.* Alcott, 6 N. Y. 64; Ins. Co. *v.* Hone, 2 Comst. (N. Y.) 235; Turner *v.* Burrows, 8 Wend. 144; Buckbee *v.* United States Ins. Co., 18 Barb. 541; Mutual Benefit Life Ins. Co. *v.* Ruse, 8 Ga. 534; Illinois Marine and Fire Ins. Co. *v.* O'Neill, 13 Ill. 89; New Hampshire Marine and Fire Ins. Co. *v.* Rand, 24 N. H. 428; M—— Co. *v.* Partridge, 25 N. H. 369; Wheeler *v.* Newbould, 16 N. Y. 393; Erwin *v.* Saunders, 1 Cow. 249; Wolfe *v.* Meyers, 3 Sandf. (N. Y.) 7; Tibbitts *v.* Percy, 24 Barb. 39; Ruse *v.* Mutual Benefit Life Ins. Co., 23 N. Y. 516; Trustees First Baptist Church *v.* Brooklyn, 19 N. Y. 305; Bodine *v.* Ex—— Fire Ins. Co., 51 N. Y. 117; Goit *v.* National Protective Ins. Co., 25 Barb. 189.

GANTT, P. J., delivered the opinion of the court.

On March 5, 1870, Joachim Gaterman took out a policy on his life, with defendant, by which he agreed to pay the sum of $70 on the day of its issue, and a like sum on March 5th in each following year, for the period of ten years; in consideration of which the company agreed to pay to him, should he survive and be alive on August 14,

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1896, the sum of $1,000; and, in case of his death, the company agreed to pay that sum to Joseph, his son, within sixty days of his death. It was provided in the policy that, should the assured cease to pay the annual premium, the company would, upon the surrender of the policy, issue in place of it a paid-up policy on the life of the assured, as follows, viz.: After the payment of two annual premiums, two-tenths; after the payment of three annual premiums, three-tenths; and so on, according to the number of years paid in, not exceeding ten years. It was further provided that the policy was to become void if the said premiums are not paid, as hereinbefore mentioned, on or before twelve o'clock (noon) on the several days specified and appointed for the payment of the same." The assured died on March 11, 1873. The premium due on March 5, 1873, was not paid. Several excuses were offered for this non-payment:

1. It was alleged that it was, and always had been, customary and usual with defendant, and its agents, to accept and receive such premium within thirty days after the same matured; and the assured contracted with reference to, and relying on, this customary indulgence.

2. That it was customary for the company to notify assured of the day of payment. That this was omitted in this instance, and the assured thereby misled.

3. That the assured was led to believe, from the commutation clause and the payment clause in the policy, that it was non-forfeitable.

4. That the assured was prevented by the act of God from paying the premium when due, he being then in a dying condition.

5. That the payment was tendered on March 7, 1873, and refused.

It will be seen that these reasons were inconsistent. The first three may escape this criticism, as compared with each other; but, if the fourth was true, the others could have had no influence on the conduct of the assured, while, if

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the first three influenced his action, his state on March 5th was not the reason of the non-payment of the premium. Looking at each one separately, however, we see no room for disapproving the action of the Circuit Court.

1. There was no evidence of any custom of which the plaintiff could have the benefit, and no evidence was offered to show such a custom. It is conceded that if, on March 7, 1873, the assured had been in good health the premium then tendered would have been accepted, and that such acceptance would have conformed to the custom of the company in such cases. Obviously the assured could not have any advantage from the establishment of such a custom.

2. As to the failure to give notice of the premium becoming due, no evidence was offered; nor was evidence offered of the custom of the company to give such notice. It would have been immaterial if offered. Such notice is always a mere voluntary courtesy, and the omission to give it entails no consequences.

3. No time need be spent on the third reason. The assured cannot be allowed to set up a misunderstanding of a very plain provision of the policy given to him. The sense in which, and the degree to which, his policy was not forfeitable was very clearly defined.

4. The fourth reason cannot avail the assured. The company insures him against certain hazards; but of others he takes the risk. It is obvious that, if casualties did not sometimes occur to the advantage of the insurer, the business of insuring lives would inevitably lead to the bankruptcy of the company engaged in it; which is only another way of saying that all those who effected insurance in such companies would lose their money. It is of the essence of the business that the underwriters, making a judicious calculation of the chances of mortality, should, on the average, gain more than they lose by taking risks on lives. Among the possibilities of gain, perhaps the largest is that which accrues from lapsed policies. Here the complete lapse is waived.

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We say waived, because the company appears to have treated the insured as if the policy had been surrendered, and a paid-up policy claimed under the first clause in the instrument following the definition of the contract. There is no justification for demanding more than this.

The company has a clear right to take advantage of precisely such contingencies as prevented the assured here from paying the premium on March 5, 1873. The case cited by counsel for respondent (*Howell* v. *Knickerbocker Ins. Co.*, 44 N. Y. 276) has received the approval of the bench and bar throughout the country; and it is decisive, not only of the fourth point made by appellant, but of the first also.

5. The tender made on March 7, 1873, could not have any influence. At that time the *legal* right to pay the premium had expired, and the assured was confessedly dying. A *new* contract of insurance, under such circumstances, was out of the question. The judgment of the Circuit Court is affirmed, all the judges concurring.

ST. LOUIS PIANO MANUFACTURING COMPANY, Respondent, *v.* LOUIS C. MERKEL *et al.*, Appellants. 305 n 398

February 28, 1876.

It is essential to the idea of a trade-mark, by which any particular manufactured article is designated, that the mark should be annexed to, or stamped, printed, carved, or engraved upon, the article as the same is offered for sale; and, if the article has not been thus distinguished, its manufacturer cannot be said to have appropriated any particular trade-mark.

APPEAL from St. Louis Circuit Court.

Injunction dissolved and judgment for appellants.

Cline, Jamison & Day, for appellants, cited: Candee *v.* Deere, 54 Ill. 434; Upton on Trade-Marks, 22, 85, 86,

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87, 98, 179; Colloday *v.* Baird, Am. T.-M. Cas. 257–259; Rowley *v.* Houghton, Am. T.-M. Cas. 489; Browne on Trade-Marks, secs. 54, 66, 67, 129, 310, 311, 312, 335, 680; Amoskeag Mfg. Co. *v.* Spear, Am. T.-M. Cas. 93, 96; Corwin *v.* Daly, Am. T.-M. Cas. 265; Phelan *v.* Wright, Am. T.-M. Cas. 307; Wolfe *v.* Godard, Am. T.-M. Cas. 226; Town *v.* Stitson, Am. T.-M. Cas. 514; Canal Co. *v.* Clark, 13 Wall. 327.

Finkelnburg & Rassieur and *E. C. Kehr*, for respondent, cited: Rudde *v.* Norman, 14 Eng. Law Rep. Eq. 348; Canal Co. *v.* Clark, 13 Wall. 311; Lea *et al.* *v.* Wolff *et al.*, 1 N. Y.; Knott *v.* Morgan, 2 Keen, 213; 2 R. I. 569 ("Pain Killer"); Coffeen *v.* Brenton, 4 McLean, 516; Williams *v.* Spruce, 25 How. (N. Y.) Pr. 366; Williams *v.* Bosworth, 2 Bos. (N. Y.) 7; Newman *v.* Alvord, 49 Barb. 588; Messerole *v.* Tynberg, 4 Abb. Pr. (N. S.) 414; Gillott *v.* Esterbrook, 47 Barb. 455; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 604; Stokes *v.* Landgraff, 17 Barb. 610; Candis *v.* Deere, 54 Ill. 439; Howard *v.* Henriques, 3 Sandf. (N. Y.) 725; Christy *v.* Murphy, 12 How. (N. Y.) Pr. 78; Suly *v.* Fisher, 11 Sim.; Canham *v.* Jones, 2 Ves. & Bea. 218; Perry *v.* Truefit, 6 Beav. 73.

GANTT, P. J., delivered the opinion of the court.

The St. Louis Piano Manufacturing Company instituted proceedings against the appellants, charging them with pirating its trade-mark, and asking an injunction, and for damages. It declared that it manufactured pianos of a particular kind, and distinguished its manufacture as the "Bell Treble" Piano. This name, it contended, it had appropriated. Its work was known by it, and defendants had done it a wrong by usurping it. It stated that it first adopted the name "Bell Treble" as a trade-mark, under which name it has ever since extensively advertised its pianos, by circulars and newspaper advertisements, having the words "Bell Treble," in prominent letters, usually

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stamped across the representation of a piano; which name served to distinguish plaintiff's pianos and business from those of other persons.

The defendants answered, ignoring the advertisement of plaintiff's pianos, as alleged, and denied that they had ever used the words "Bell Treble" as a trade-mark for their work. They denied that the words were first used by plaintiff to distinguish its work. They denied any appropriation of the term by the plaintiff. They claimed that the term had been long known to musicians and manufacturers of pianos; that it was descriptive of a particular "part, or attachment, or appliance to a piano," which said part of the piano all manufacturers of pianos have a perfect and undisputed right, in this and other countries, to use; that one of the defendants had actually used the term, and manufactured pianos in St. Louis to which the name was affixed; that defendants have never manufactured or sold any pianos to which the words "Bell Treble" were affixed, or in any way appeared on the pianos; and that the plaintiff had never manufactured or sold any pianos to which the said words were affixed, or in any way appeared; that plaintiff could only appropriate the term as a trade-mark by so affixing it; and, consequently, defendants prayed for a dissolution of the injunction which the court had preliminarily granted. A reply to this answer was filed.

The court, at the hearing, perpetuated the injunction, and, after the usual motions, defendants appealed to the general term, and to this court.

The bill of exceptions shows a great volume of testimony directed to the question of the priority of plaintiff's right to the use of the term "Bell Treble." It did not appear, and, indeed, it is not alleged in the petition, that the name "Bell Treble" was affixed to, or marked on, the goods of the plaintiff. It was only claimed that it was used in its advertisements. The defendants appear to have distinguished some pianos of their manufacture with this name,

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by marking it on them. The manner of putting the mark on the instrument does not clearly appear. Apparently it was done by pasting a label on part of the piano. This was done some time after the plaintiff had advertised its pianos as the "Bell Treble" piano. The evidence seems to us greatly to preponderate in favor of the conclusion that the plaintiff was the first manufacturer which used the term "Bell Treble" in its advertisements to distinguish its work. We are also of opinion that the term itself is a combination of words which was capable of appropriation as a trade-mark. The question which has given us serious trouble is whether the plaintiff, which was, as we think, the first manufacturer which attempted to appropriate the term as a trade-mark, ever did anything effectual for the purpose of such appropriation.

We have seen that it was never affixed to any work of the plaintiff. Of course, in some cases, the work or manufacture itself which is to be thus distinguished cannot receive the mark, as would be the case in respect of a powder or liquid which is advertised or offered for sale. But, in such instances, the package or bottle containing the article can receive, and, as far as we are able to see, always has received, the mark in which a property is claimed. The very term employed seems to require that the article distinguished, or which the manufacturer or salesman seeks to distinguish, as coming within the designated description should bear the *mark* which gives it its character. A trade-mark which is not in some manner put upon or affixed to the article indicated by it is almost a contradiction in terms. The article can scarcely be said to have the mark, in any natural or reasonable sense.

The treatises in which this subject is discussed leave something to be desired. The first thing they should contain is a definition of the term "trade-mark." This definition could not be given in a breath. But the subject of it should be taken up, pursued, and disposed of before

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proceeding to examine the legal rights and liabilities that may be claimed and incurred in respect of it. A comprehensive and accurate definition of the term would, of course, require an extended examination of the cases in which it had been judicially discussed. It would be a matter of laborious criticism to ascertain what qualities were, and what were not, of the essence of a trade-mark such as the law recognizes and protects. But, when the demonstration was completed, the best foundation would perhaps have been laid for the treatise proposed.

Obviously it is no part of the business of a court to furnish such a definition. When a controversy comes before a court respecting a trade-mark, and the fact of a particular symbol being such in a legal sense is controverted, the court should confine its inquiry to the particulars which are the subject of the dispute. Thus, in most instances, only one or two of the properties of a trade-mark will be examined in any case, and upon these the conclusion of the court may be, and often is, of a negative import. A court may inquire whether some particular quality in which a symbol is defective be essential to the legal idea of a trade-mark. When that point is settled, the controversy is determined; that being the only dispute between the litigants. But such a decision will furnish very imperfect elements of a definition.

From the best examination we are able to make of the subject, we are led to the conclusion that, so far as an article of merchandise is concerned, it can only be said to be distinguished by a trade-mark when that mark is connected with, annexed to, or stamped, printed, carved, or engraved upon the article as the same is offered for sale. The purchaser must be told that the particular thing he proposes to buy is of this or that character, by something connected with the thing itself. He must not be referred to some circular or advertisement for this assurance, nor can he receive it from the representations, by word of mouth, of the manufacturer or salesman. The impossibility of

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putting any restrictions upon the last may be a sufficient reason for not making the attempt; but the other branch of the proposition seems to be equally settled by judicial opinion. "A symbol does not become a trade-mark until it is actually stamped upon, or otherwise affixed to, the goods to be sold," is the language of Browne, in his treatise on Trade-Marks, section 311. This remark seems abundantly justified by the decisions of the courts which have adjudicated respecting trade-marks, besides being in harmony with what any one of ordinary understanding would infer from the name itself.

In 2 Brewster, 303 (Am. Trade-Mark Cases, 486–489), Judge Ludlow's attention was drawn to this point. *Rowly* v. *Houghton*. This conclusion was in conformity with a former decision that "no right can be absolute in a name, as a name merely. It is only *when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods*, that it becomes a trade-mark."

In 54 Illinois, 439 (456, 457, for the passage cited), this point underwent a careful and accurate examination. The case was that of *Candee, Swan & Co.* v. *Deere & Co.* Mr. Justice Breese quotes the definition of the term trade-mark from Upton, and announces, as a conclusion which has his concurrence, that it is "a symbol, or emblem, or mark which a tradesman puts upon, or wraps, or attaches in some way to the goods he manufactures; * * * the name, symbol, figure, letter, form, or device adopted or used by a manufacturer or merchant, in order to designate the goods he manufactures or sells, * * * to the end that they may be known in the market as his."

Without quoting more largely from this decision, we content ourselves with saying that we adopt the result of it, as far as the present question is concerned. We think that a trade-mark must be annexed to the article offered for sale; and that, if not so annexed, the article cannot be said to

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have a trade-mark. In the case at bar, the pianos of plaintiff had no such symbol affixed, annexed, stamped, or engraved on them as plaintiff claims to belong to it, and it follows that, in our judgment, the plaintiff was not entitled to the injunction for which it prayed.

We have had the advantage of seeing a copy of a very able argument made in the Circuit Court, in this cause, in behalf of the St. Louis Piano Manufacturing Company. It leaves, we think, no room for regretting that its side of the controversy was not otherwise advocated in this court. It is laborious and ingenious, but we are of opinion that it struggles with difficulties which are insurmountable. In the citation of cases, in which, as the learned counsel who prepared it contend that the vital and necessary characteristic of a trade-mark, as declared by Upton, Browne, Ludlow, and Breese, is at least *ignored*, they have not been able to find any repudiation of that characteristic. At most they have found partial definitions into which this particular element does not enter. But it is needless to enlarge upon the obvious fallacy which lurks in such reasoning.

It is observable that some of the cases thus cited, to prove negatively that a trade-mark need not be affixed to the merchandise offered for sale, might be fairly quoted to demonstrate that such was *not* the opinion of the learned judges who pronounced them. One of the cases thus cited for the Piano Manufacturing Company, in the Circuit Court, is that of *The Delaware & Hudson Canal Company* v. *Clark*, 13 Wall. 311. The learned counsel for the Piano Company contend that it nowhere appears in the authoritative opinion of Mr. Justice Strong, in this case, that the Lackawanna coal had ever been marked with that name; that the name had ever been affixed to the merchandise, or that such connection between the merchandise and the name was important. That case turned upon the right of any one to appropriate such a term as Lackawanna. This was the name of the region of country where the coal in

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question was produced. The court held that it was not the subject of appropriation, any more than "Kentucky hemp," "Virginia tobacco," etc., could be so appropriated. To this point the attention of the court was mainly directed. But on page 322 may be found a passage which the respondent in this case would perhaps not approve: "The office of a trade-mark is to point out distinctively the origin or ownership of the article to which *it is affixed*; or, in other words, to give notice who was the producer." Now, of course, no one would require that each lump, or any lump, of coal should bear this mark. But the warehouse, store, yard, or other receptacle of it would apparently require such a designation, in the opinion of Judge Strong, or else the trade-mark would not fulfill its office, and would, in fact, be no trade-mark, in either a popular or legal sense.

We are of opinion, as before stated, that a trade-mark must be affixed to the merchandise of which it is distinctive; that the failure of the plaintiff to affix the term or name "Bell Treble" to pianos of its manufacture disables it from claiming that defendants have injured it by affixing it to theirs; and, consequently, that the judgment of the Circuit Court must be reversed, the injunction dissolved, and final judgment given for defendants (appellants) in this court. All the judges concur

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PHILIP C. TAYLOR, Respondent, *v.* FREDERICK SAUGRAIN, Appellant, and THOMAS S. NELSON, Respondent.

February 28, 1876.

A, and B his wife, and A as trustee of B, were parties named as grantors in a deed of trust conveying certain property belonging to A, and also certain property belonging to the trust estate of B, to secure the payment of a note for money borrowed by A from C. This deed was executed by "A, trustee of B," and also by B, and was acknowledged by A and wife as

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their act and deed, and also by B herself in such manner as not only to refer to her trust estate, but to the lot in which she had only a contingent right of dower. *Held*, 1. That A is estopped to say that the manner of setting his hand and seal to this instrument was intended to give it an operation less broad than its purport. 2. That, after delivering this instrument to C, as his deed, duly acknowledged and certified as such, and receiving C's money therefor, it would be inequitable to permit him to suggest any want of formality in its execution.

APPEAL from St. Louis Circuit Court.

Reversed with final judgment.

E. T. Farish, for appellant, cited: Baldwin v. Snowden, 11 Ohio St. 203; Goodtitle v. Bailey, Cowp. 600; 1 Johns. 91; 1 Johns. 399; 3 Johns. 388; Jackson v. Downsborough, 1 Johns. 95; Bridge v. Wellington, 1 Mass. 219; 10 Modern, 46; Wilkinson v. The A. C. G. M. Co., 12 Eng. Law & Eq. 144; Yale v. Flanders, 4 Wis. 96; Plummer v. Russell, 2 Bibb (Ky.), 174; Aveline v. Whisson, 4 Man. & G. 801; Cromwell v. Grunnden, 2 Salk. 462; 7 Blackf. (Ind.) 536; Park v. Hazelrigg, 1 Pars. (Penn.) Eq. 96, note; 1 Pike (Ark.), 108; Lessee of Diard v. Davis, 6 Pet. 60; Cooch v. Goodman, 2 Ad. & E. 284.

H. A. Clover, for respondent.

GANTT, P. J., delivered the opinion of the court.

Philip C. Taylor, sheriff of St. Louis county, had been substituted in the place of the original trustee, in a deed made by Thomas S. Nelson, to secure the city of St. Louis for the unpaid portion of the purchase money of a lot in the St. Louis common, and, after paying the city, there was a balance in his hands, claimed by both Saugrain and Nelson. He filed a bill of interpleader and paid the money into court, to be contended for by Nelson and Saugrain. The court decided in favor of Nelson, and Saugrain brings the case here by appeal.

Saugrain's claim to the fund is thus supported: On July 21, 1860, by a deed between Thomas S. Nelson and Eliza, his wife, of the city and county of St. Louis, and State of Missouri, and Thomas S. Nelson, trustee of Eliza Nelson,

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acting under the direction of the said Eliza Nelson, as is evidenced by her signature hereto, and at the request of Socrates Newman and Richard J. Howard, of the county aforesaid, which request is evidenced by the signature of the said Newman and Howard to this deed, parties of the first part, Robert A. Bakewell, party of the second part, and Frederick Saugrain, of the third part, there were conveyed to Bakewell lots 8, 9, and 10, of block 1, of the third subdivision of the city common; also, lots 12 and 17, in Newman and Howard's addition to the city of St. Louis, in trust to secure $2,000, owing from Nelson to Saugrain; for which he, on July 21, 1876, executed his promissory note, payable one year after date, with power in the trustee to sell the land conveyed, in default of payment of the note. The deed concluded thus:

"In witness whereof, the parties of the first part have hereunto set their hands and seals, the day and year first above written.

"Thomas S. Nelson. [L. S.]
"*Trustee of Eliza Nelson.*
"Eliza Nelson. [L. S.]
"R. J. Howard. [L. S.]
"Soc. Newman. [L. S.]"

The acknowledgment was as follows:

"State of Missouri, county of St. Louis. Be it remembered that, on this 21st day of July, A. D. 1860, before etc., etc., came Thomas S. Nelson and Eliza Nelson, his wife, and Socrates Newman and Richard Howard, who are all personally known to be the same persons whose names are subscribed to the foregoing instrument of writing as the parties thereto, and severally acknowledged the same to be their act and deed, for the purposes therein mentioned; and the said Eliza Nelson, the contents of the foregoing instrument being first by me made fully known unto her, acknowledged, on an examination separate and apart from her said husband, that she executed the same freely,

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and without compulsion or undue influence of her said husband; and, as the said Eliza Nelson claims a dower interest in the property first in said deed described, she further acknowledged that she relinquished her dower in said property freely, and without any compulsion or undue influence of her said husband. In witness," etc.

On May 23, 1864, a sale was made under the deed of trust, to pay the note of Nelson, which was overdue, and Saugrain became the purchaser, paying for the lots 8, 9, and 10 the sum of $595, and for lots 12 and 17 $1,025, and a deed was made by the trustee to him, of that date. Nelson claimed that the instrument dated July 21, 1860, was not his deed; that lots 8, 9, and 10, therefore, were not conveyed to the trustee of Saugrain, and, consequently, nothing passed by the trustee's deed to Saugrain. Of this opinion was the Circuit Court, which gave judgment for Nelson, and Saugrain appealed to this court.

1. The deed of July 21, 1860, purported to be the deed of Thomas S. Nelson and Eliza, his wife, and of Thomas S. Nelson, trustee of Eliza Nelson, parties of the first part. It declares in the *testimonium* clause that "the parties of the first part have hereunto set their hands and seals." Then follow the names of them all. Instead, however, of repeating his signature, to correspond with the two characters in which he was a party to this deed, Nelson's appears only once, written thus: "Thomas S. Nelson, trustee of Eliza Nelson. [L. S.]" When the instrument is acknowledged, it is not acknowledged as the deed of "Thomas S. Nelson, trustee of Eliza Nelson," but in broad and comprehensive terms it is certified that "Thomas S. Nelson and Eliza, his wife, Socrates Newman, and Richard Howard" came before the notary and "severally acknowledged the same to be their act and deed." That is, Nelson, whose name and seal appear to the instrument, acknowledged and declared it to be his deed. He now seeks to repudiate it, and unsay what he said in 1860. By what he then said he procured $2,000

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of Saugrain's money. A court of justice will give no willing aid to such an attempt; but if Saugrain had no title to the land which was sold by the trustee of the city, in 1871, it may be unable to help him. We see no legal ground for the distinction attempted by Nelson. He was *sui juris*, and must be taken to be cognizant of the contents of the deed he signed and acknowledged. That his hand is set to it is undeniable; that his seal, also, is affixed is plain; and, in the authentic manner prescribed by law, he declares it to be his deed. The argument is that, his signature purporting to be merely that of "Thomas S. Nelson, trustee of Eliza Nelson," and there being no signature of "Thomas S. Nelson" simply, he must be taken not to have intended to sign the paper except as the trustee of Eliza Nelson. We cannot listen to this argument unless we suppose that, on July 21, 1860, Nelson intended to perpetrate a very base fraud on Saugrain. We must suppose that, after executing this deed and acknowledging it, Nelson delivered it to Saugrain. By the first part of the instrument Saugrain was informed that it was the deed of Nelson and wife, and also of Mrs. Nelson's trustee. He was further told that all the parties of the first part had set their hands and seals to the paper. He saw that, in fact, this was true. And he was further informed, by the certificate of acknowledgment, that Nelson had declared it to be his deed—not merely the deed of the grantors collectively, but the deed of each of them severally. We are of opinion that, after all this, Nelson is estopped to say that it is not his deed. When any one has induced another to accept a particular hypothesis, he shall not afterwards, to the injury of that other, contradict that hypothesis. This is the rule of law as declared by the Supreme Court of Missouri in the case of *Lindell* v. *McLaughlin*, 30 Mo. 28–33. The learned judge who delivered the opinion of the court on that occasion uses the following language: "The plain and simple principle of natural equity which lies at the foundation of these New York

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decisions, and constitutes, in truth, the main reason for the various modifications of what has been termed estoppels *in pais*, is that, when a man misleads another, by his acts or words, so as to occasion an expenditure of money on the part of the latter, the former will not be allowed to change his assertions or claims to the detriment of the party misled. It is a practical fraud, although no fraud may be intended, to permit this to be done." Therefore, even if we were of opinion that this paper was not in strictness the deed of Nelson, we would hold that he shall not now unsay what he said on this subject in 1860. We incline to think that in all respects it is his deed, that it so professes to be, and that his hand and seal are affixed to it in witness of his solemn act. But, because the first consideration completely disposes of the case, and because it is injudicious for courts to decide more than is necessary for the determination of the controversy presented by the record, we express no opinion on this point. We content ourselves with declaring that in this case he is estopped to say it is not his deed, and, Judge LEWIS concurring, Judge BAKEWELL not sitting, having been of counsel, we give final judgment in this court in favor of Saugrain.

WILLIAM DAWSON, Appellant, *v.* AMERICAN CENTRAL INSURANCE COMPANY, Respondent.

February 28, 1876.

1. **Plaintiff took out a fire policy, in the office of defendant, on a dwelling-house. One of the conditions of insurance was that, if the house should become vacant and unoccupied, the policy should be void. The house was occupied when insured, but subsequently became vacant, and while vacant was burned. *Held*, that the underwriter was discharged.**
2. **The Court of Appeals cannot order to be certified up, for its inspection, an original paper used as evidence in the court below.**

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Appeal from St. Louis Circuit Court.

Affirmed.

Sharman & Cameron, for appellant, cited: Leggett *v.* Ins. Co., 10 Rich. (S. C.) 202; Shaw *v.* Hawkes, 6 Ad. & E. 75; Williams *v.* New England Mutual Fire Ins. Co., 31 Me. 225; Billings *v.* Tolland County Mutual Fire Ins. Co., 20 Conn. 139; Farmers and Mechanics' Ins. Co. *v.* Simmons, 30 Penn. St. 299; The Merchants and Mechanics' Ins. Co. *v.* The Washington Mutual Ins. Co., 1 Handy (Ohio), 408; Shearman *v.* The Niagara Ins. Co., 46 N. Y. 532; Tesson *v.* The Atlantic Mutual Ins. Co., 40 Mo. 38; 1 Ph. on Ins., secs. 766, 872; Aurora Fire Ins. Co. *v.* Eddy, 49 Ill. 108; Hoffman *v.* Ætna Ins. Co., 32 N. Y. 413; Yeaton *v.* Fry, 5 Cranch, 341; Palmer *v.* Western Ins. Co., 1 Story, 364, 365; Petty *v.* Royal Exchange Ins. Co., 1 Burr. 340; 54 N. Y. 573.

Rankin & Hayden, for respondent, cited: Harrison *v.* City Fire Ins. Co., 9 Allen (Mass.), 231; Wustum *v.* Ins. Co., 15 Wis. 138; Keith *v.* Ins. Co., 10 Allen (Mass.), 228; Kimball *v.* Ins. Co., 8 Gray (Mass.), 233; Mellen *v.* Ins. Co., 17 N. Y. 609; City, etc., *v.* Ins. Co., 9 Gray (Mass.), 27; Mead *v.* Northwestern Ins. Co., 7 N. Y. 530.

Gantt, P. J., delivered the opinion of the court.

Dawson took out a policy in the office of defendent, dated January 30, 1872, insuring a house, to him belonging, against loss by fire for one year, in the sum of $1,200. The house was destroyed by fire on December 28, 1872, and this suit being brought, defendant answered that one of the conditions of the policy was that, if the house should become vacant and unoccupied, the policy should be void; that, when insured, the house was occupied as a dwelling; that, in November, 1872, it became vacant and unoccupied, by the consent and knowledge of the plaintiff, and was destroyed while thus vacant and unoccupied. The plaintiff

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replied that this condition was fraudulently printed in such small type that plaintiff could not read it; that the agent of defendant assured him that the policy was all right; that the premises were not vacant with the knowledge or consent of the plaintiff; and that, as soon as he discovered that they were vacant, he bestirred himself to obtain another tenant.

At the trial, after putting in the policy, the plaintiff was sworn. He testified that he never read, nor attempted to read, the policy; that his sight was very defective, and had been for some years; that a man named Hubbard came to his house, bringing him a policy from the Ætna, and asked him if he had any other houses to insure. Hubbard was travelling about, giving policies on lives and against fire. Dawson said he wanted to know the contents of this policy, when Hubbard brought it to him. Hubbard replied, "Never mind, its all right," and showed him a schedule setting forth what losses the defendant had paid on the Chicago fire. The house was occupied when insured. It was vacant and unoccupied when burned, and had been so for about four weeks. The tenant moved out, by the direction of plaintiff, about the middle of November, 1872. At the close of the plaintiff's case the court declared that the plaintiff could not recover. He excepted, and appealed to this court.

There is no error in this record. It was plainly declared that the policy would not cover the house if it became vacant and unoccupied. It did become vacant and unoccupied by the act of the plaintiff himself, and so continued for a period variously estimated at from four to six weeks. While thus vacant and unoccupied it was burned. It was not at the risk of the company at that time. It was alleged in the reply that the condition was fraudulently printed in small type in order to deceive the plaintiff. This allegation is entirely unsupported by evidence. No attempt, so far as we can see, was made to support it.

Since writing this opinion, the counsel for appellant have

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filed a motion asking this court to order the original policy to be sent up to be inspected, for the purpose of enabling it to understand the force of the objection made by Dawson, in the Circuit Court, to the smallness of the type in which part of this policy was printed. There are obvious reasons why this motion cannot be granted, of which we need only state one, namely, that this court has no power to amend or enlarge a bill of exceptions. But, even if this original policy were made part of the record, what possible weight could be given to this objection, when we are told by the plaintiff himself that he never attempted to read, or to cause to be read to him, this policy?

The judgment of the Circuit Court is affirmed, all the judges concurring.

THE SHAMROCK BENEVOLENT SOCIETY *v.* BRIDGET DRUM, Respondent, and DANIEL L. MCCARTHY, Appellant.

February 28, 1876.

1. **The deceased husband of plaintiff was a member of the Shamrock Benevolent Association, and died in 1873, leaving a will by which he bequeathed his personal property and his benefits from the association to his sister. The benefits of the association were, by its constitution, devoted to the widow of a deceased member, or to his other legal representative in the order named. *Held*, that the right of the widow thereunder was superior to that of the legatee of the deceased member.**
2. **In such a case, adultery by the widow will create no forfeiture.**

APPEAL from St. Louis Circuit Court.

Affirmed.

Samuel Erskine and *M. Kinealy*, for appellant, cited: Schouler on Dom. Rel. 133; Cogswell *v.* Libbets, 3 N. H. 42.

J. A. Beal, for respondent, cited: Love *v.* Hancock Life Ins. Co., 41 Mo. 538; Wag. Stat. 542, sec. 20.

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GANTT, P. J., delivered the opinion of the court.

William Drum was a member of the Shamrock Benevolent Association. He died on April 3, 1873, leaving a will by which he bequeathed all his personal property, and whatever was coming to him from the Shamrock Benevolent Society, to his sister, Johanna McCarthy. Letters of administration with the will annexed were granted to Daniel McCarthy.

Two drafts of the constitution of the society are appended to the record. One was offered by the administrator, the other by the widow of the deceased. In each the 12th Article is the controlling provision. One of these constitutions purports to have gone into effect on March 3, 1872, the other on March 3, 1873; but it was in evidence "that the latter did not go into effect until some time in April, 1873." The witness who thus testified also said that Drum died on March 3 or 4, 1873. This is a plain mistake. This will was dated March 21, 1873, and he is proved to have died on April 3, 1873.

The 12th Article of the Constitution of 1872 is in these words: "At the next general meeting of the society after the death of a member there shall be collected from each member the sum of one dollar, in addition to his regular monthly dues.

"This assessment shall be known as the 'mortality assessment,' and when so collected shall be paid to the widow or other legal representative of the deceased."

On the outside of the cover of the pamphlet containing this provision are the words, by way of title, "Constitution and By-Laws of the Shamrock Benevolent Society of St. Louis, adopted March 3, 1873."

The other pamphlet has on the outside cover the words, "Constitution and By-Laws of the Shamrock Benevolent Society of St. Louis, adopted March 3, 1873." On the inside, on what may be termed the title page, are the same words, except that the date of adoption purports to be

"March 3, *1872*." In this constitution, Article 12 is as follows:

"At the next general meeting of the society after the death of a member in good standing there shall be collected from each member the sum of one dollar, in addition to his regular monthly dues. This assessment shall be for the purpose of creating a fund for the benefit of the family of the deceased member, and shall be paid into the treasury of the society. At the expiration of two months after the death of a member the board shall have power to draw their warrant upon the treasurer for the sum of one dollar for every member then in good standing. The aggregate amount thus drawn shall be paid over to the widow, children, or parents of the deceased, or to any person named in his will. The claims of the above-mentioned persons shall be considered only in the order in which they are named. No other person or persons shall have any claim to this fund except those mentioned in this article." * * *

We are freed from the difficulty of determining whether the first or second of these constitutions is to govern the disposition of this mortality fund, because, so far as the actual controversy is concerned, the decision must be the same under either.

Upon the death of Drum, his widow and his administrator claimed this fund, and each sued the Shamrock Benevolent Society, which paid the fund into court to be contended for by the parties claiming it.

It was alleged by the administrator that the widow had eloped, and was living in adultery with a strange man. The widow admitted this charge for the sake of argument. The Circuit Court gave judgment for the widow, and the administrator appealed.

We see no error in this ruling. Very clearly, if the constitution of 1873 had been the guide, the widow is, first of all, the person to receive the fund, and such, we think, is the intention of the constitution of 1872, though less plainly

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expressed. We cannot apply to a case of this nature the analogy of our statute respecting the forfeiture of dower for the misconduct of the wife. The judgment is affirmed. All the judges concurring.

UNION SAVINGS ASSOCIATION, Respondent, *v.* CARL DIEBOLD *et al.*, Respondents, and G. VAN WINKLE *et al.*, Appellants.

February 28, 1876.

Plaintiff sued as holder of an accepted bill of exchange, which was indorsed in the name of defendants D. & K. the payees, by their alleged agent. Defendants D. & K. denied the indorsement and the authority to make it, under oath. The agent's authority was not proved, but the indorsement was admitted in evidence against the other defendants, the acceptors. *Held*, erroneous; because plaintiff showed no title to the bill, which could only be made through a valid indorsement by D. & K.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Joseph T. Tatum, for appellants, cited: 2 Wag. Stat. 1046, sec. 45; Carroll *v.* Corn, 1 Mo. 161; 2 Greenl. on Ev., secs. 155, 161, 162; Story on Bills, sec. 451; 2 Pars. on Notes & Bills, 119; Sone *v.* Palmer, 28 Mo. 539, last par. on 542; Story on Ag. (8th ed.), secs. 99, 78, and cases cited; Story on Ag., sec. 87; Beach *v.* Vandewater, 1 Sandf. (N. Y.) 265; Paley on Ag. 278; Sweeting *v.* Pearce, 9 C. B. (N. S.) 537; Graham *v.* United States Savings Assn., 46 Mo. 186; Filley *v.* Gilman, 2 N. Y. (Sup. Ct.) 339; Hunt *v.* Chapin, 6 Lans. (N. Y.) 139; Davidson *v.* Stanley, 2 Man. & G. 721; Hawtayne *v.* Bourne, 7 M. & W. 595: Hoggus *v.* Snaith, 1 Taun. 347; Fenn *v.* Harrison, 3 T. R. 757; Chouteau *v.* Filley, 50 Mo. 174.

Joseph Shippen, for respondent, cited: 2 Greenl. on Ev., sec. 65; Story on Ag., sec. 86.

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GANTT, P. J., delivered the opinion of the court.

This suit was brought by the plaintiff, on a bill of exchange in the words and figures following:

"$1,000. *St. Louis, January 9, 1872.*

"Sixty days, pay to the order of Diebold & Kienzle one thousand dollars, value received, and charge the same to the account of Diebold & Kienzle.

"GEO. F. COCHNOWER.

"To G. Van Winkle & Co., Sherman, Texas."

Across the face of the draft was written the name of G. Van Winkle & Co., and on the back of it, "Diebold & Kienzle. GEO. F. COCHNOWER, Agt. D. & K."

Suit was brought against the acceptors and indorsers, Diebold & Kienzle and Van Winkle & Co.

An answer, verified by affidavit, was filed in the name of "Charles Diebold, Jacob Kienzle, *et al.*" They deny that they indorsed the bill of exchange; allege that Cochnower was their salesman at St. Louis (Diebold & Kienzle resided at Cincinnati); deny that Cochnower had authority to sign their name as indorsers; deny presentment and demand, notice and protest; allege that Cochnower delivered the bill to plaintiff as collateral for a loan made to himself by plaintiff, and that he had no power to do this. A replication was filed.

At the trial, which was before the court sitting as a jury, there was judgment against the defendants Van Winkle & Slater, and judgment in favor of Diebold & Kienzle.

By the bill of exceptions it appears that the plaintiff offered in evidence the draft sued upon, and the court admitted it against the objection and exception of defendants. The incorporation of plaintiff proved.

Plaintiff examined H. Y. Shell, Adolph Gluck, Herman Kosmahl, M. Ravold. They wholly failed to show that Cochnower had authority to sign the name of Diebold & Kienzle to any note or bill, either as maker or indorser of

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a note, or drawer or indorser of a bill. It is not important to detail their evidence.

The plaintiff then gave evidence that the bill sued on was accepted for the price of a safe to be made for Van Winkle & Slater. The contract for this safe was signed by "Diebold & Kienzle, by Geo. F. Cochnower; Van Winkle & Slater."

James E. Love, cashier of plaintiff, testified that he knew Cochnower, and that he did business with plaintiff as agent for Diebold & Kienzle. The deposit tickets used by him were headed and signed as follows, respectively:

"Deposit Ticket Union Savings Association. Deposited by Geo. F. Cochnower, Agt. D. & K., currency, 50 dollars."

[Check.]

"No. 87. *St. Louis, January 10, 1872.*

"Union Savings Association pay to Joseph Nagle, or order, forty-six dollars.

"GEO. F. COCHNOWER, Agt. D. & K."

"All the business of Cochnower with us was done in that way." Witness recognized the bill sued on. "Cochnower, as agent for Diebold & Kienzle, used to make discounts with us. He called on us to discount this draft, and left it to be submitted. Called next day and asked about it; told him we were inquiring about it. Van Winkle was in the city at the time; showed it to him; he verified his signature. Cochnower called next day; told him we had not discounted it yet. He said he was short of money and must have $500. I said he could have it, and make his check therefor in the usual form. He was there twice or thrice afterwards, and actually checked for about $700. He stated he was going away."

On cross-examination he said: "The account of Cochnower was kept in the same name that the checks were signed. In the deposit-book and the books of original entries of plaintiff he was described as 'Geo. F. Cochnower, agt.' The letters D. & K. were not put in our

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books. * * * Diebold & Kienzle never told me they had given power to Cochnower to keep a bank account, but, after Cochnower ran off, Kienzle asked me how much they were in for. Received the acceptance January 9, 1872. The last check was paid January 12, 1872. Refused all others. When all the credits were given, after that last check was paid, the balance to debit of Cochnower was $624.32."

It would *seem* that the plaintiff did not credit the account of Cochnower with this bill; but the point was not made clear.

This was all the evidence on the part of the plaintiff; and defendants asked the court to declare that plaintiff could not recover. The court refused this instruction, and defendants excepted.

Diebold & Kienzle's depositions were read, in which they negatived, pointedly and positively, all authority to Cochnower except to sell safes and take contracts for making them. He was expressly prohibited from keeping any banking account, or transacting any banking business, in their name. They never knew of this transaction until after Cochnower ran away; never heard, till then, that he kept a bank account. They never indorsed the bill sued on, or authorized any one to indorse it.

This was all the evidence. The court gave judgment against Van Winkle & Slater, but in favor of Diebold & Kienzle. Van Winkle & Slater appealed.

1. We think the court erred. We do not see how the judgment could have been in favor of the one, and against the other, unless, indeed, Diebold & Kienzle were held to have been discharged by the failure to protest the bill and give notice to the indorsers. On this point the record is wholly silent. Indeed, we nowhere find in the record the bill sued on. The copy we have set out here is taken from the statement of the counsel for appellants, and it does not appear, by that copy, *when* the bill became due. Its maturity, it is presumed, has some connection with "sixty days"

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before or after some epoch. But this is all we see, and no protest of the bill appears, which, as it is a foreign bill, seems necessary.

But, waiving that point, the plaintiff could only make title to the bill through Diebold & Kienzle. They were the payees, and they never indorsed the bill. In fact we are not told who it was that did sign their name on that instrument. We may conjecture that it was Cochnower, but *his* authority to do it is effectually negatived. It was incumbent on plaintiff to establish such authority in him. This it did not, apparently, seek to do, and Diebold & Kienzle proved that he had no such power.

2. The instruction asked for at the close of the plaintiff's case should have been given. Diebold & Kienzle had not signed their names, or permitted or authorized any one, expressly or impliedly, to sign their name, on that bill of exchange. Without a transfer of title to the bill from them, plaintiff had no right whatever to it; for it is undeniable that when the bill was drawn by Cochnower, in favor of Diebold & Kienzle, on Van Winkle & Slater, and accepted by these last, it was on the footing of a promissory note executed by Van Winkle & Slater in favor of Diebold & Kienzle. In this condition it came into the hands of the plaintiff with a forged indorsement of Diebold & Kienzle. Obviously the plaintiff got no right of action, either against the acceptors or the indorsers; not against the indorsers, for their signature was forged; and not against the acceptors, for the bill was the property, not of the plaintiff, but the payees. The Circuit Court did not apparently remark that, although Van Winkle & Slater were clearly liable to some one, they could only be liable to the lawful holder of this bill, and plaintiff was not the lawful holder of it.

3. For this reason the court erred in admitting the bill without proof of its indorsement. In this action it was evidence against nobody until the indorsement of Diebold & Kienzle was proved. This had been denied, under oath,

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by them; yet the court, apparently, admitted the paper, with its indorsements, without any evidence whatever. When the court finally gave judgment in favor of Diebold & Kienzle, but against Van Winkle & Slater, we should be disposed to conjecture that it did so because no steps appear to have been taken to charge the indorsers. But we are met by the difficulty of understanding how it was that the deduction of title of the plaintiff to the bill was made out. The record shows no evidence that this was done, or even attempted.

All the judges concurring, the judgment of the Circuit Court is reversed and the cause remanded.

1	328
44	650
1	328
48	460
1	328
51	251
1	328
58	370
1	328
66	166

S. F. Blackwell, Respondent, *v.* C. W. and D. Baily, Appellants.

February 28, 1876.

1. When articles of personal property are left by their owner in the hands of another, or subject to his control, with instructions as to their disposition, although the latter may decline the trust altogether, yet, if he accepts it, he will be responsible for a loss of the property caused or negligently permitted by him.
2. No other error appearing, a judgment will not be reversed because an incompetent witness was permitted to testify to a fact which was also proved by a competent witness.
3. A party at whose instance an objectionable instruction was given cannot complain of its supposed inconsistency with a proper instruction given for the adverse party.

Appeal from the St. Louis Circuit Court.

Affirmed.

G. M. Stewart, for appellant.

L. B. Beach, for respondent, cited: 2 Ph. on Ev. 224; Chouteau *v.* Steamboat St. Anthony, 11 Mo. 226; 2 Greenl. on Ev. 264; Koch *v.* Branch, 44 Mo. 542; 3 Stark. on Ev. 1492; O'Donohue *v.* Cosby, 22 Mo. 393; 1 Chitty's Pl. 154; Glasby *v.* Prewitt, 26 Mo. 121; Henderson *v.* Skin-

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ner, 13 Mo. 70; Reynolds *v.* Schuler, 5 Cow. 323; Webstern *v.* Weylman, 11 Mo. 428; Polk's Admr. *v.* Allen, 19 Mo. 467; Carter *v.* Feland, 17 Mo. 383; Robinson *v.* United Ins. Co., 1 Johns. 592; Lattimer *v.* Wheeler, 1 Keys, 468; Boyce *v.* Brockway, 31 N. Y. 490; Kerr *v.* Mount, 28 N. Y. 659; Morgan *v.* Gregg, 46 Barb. 183; Hicke *v.* Cleveland, 39 Barb. 573; Person *v.* Civer, How. Pr. 432; Tate *v.* Bancroft, 1 Mo. 163; Wear *v.* McCorkle, 1 Mo. 588; Wathen *v.* English, 1 Mo. 746; Orth *v.* Dorschlein, 32 Mo. 366; Swearingen *v.* Orne, 40 Mo. 168; Wag. Stat. 1068, sec. 32; Gareschê *v.* Piquenot, 17 Mo. 310.

GANTT, P. J., delivered the opinion of the court.

This case was originally commenced before a justice of the peace. The complaint charged the defendants with the conversion of certain personal property, of the value of $100, belonging to plaintiff. By the bill of exceptions in the Circuit Court, to which defendants appealed after a verdict and judgment against them in the justice's court, it appeared that defendants were real estate agents; that plaintiff occupied a house on Broadway under charge of defendants; that in June, 1871, wishing to leave the premises, he sent the key to defendants, with the message that a small balance of rent by him owing could be had by their sending to him, on Morgan street, where plaintiff also wished to see them, to arrange for the storing of certain property by him left in the building on Broadway, the same of which the conversion is charged in this suit; that defendants received the key, saying "all right;" that they did not call on plaintiff, nor he on them, and that plaintiff, on looking after his property in September, 1871, found that it had all disappeared, and further found that defendants had leased the building vacated by plaintiff to a person named Amspaugh; and that they had told Amspaugh that he might have the property in the building in consideration of making certain repairs thereto. The wife of plaintiff testified that she had taken the key to defendants, with the

message of her husband, in June, 1871; that David Baily, one of the defendants, replied, "All right, he would see about it;" and that, at the trial in the justice's court, she heard David Baily testify that he told Amspaugh he could have the property for repairing the building. To this evidence of the wife, defendants excepted. The court overruled a demurrer to the evidence, and defendants produced as a witness David Baily, who testified that plaintiff's wife brought him the key of the building, in June, 1871; that she told him that plaintiff had left the building; that, if witness would call on him, he would pay the balance of the rent due; that she said nothing of the property left in the building, and witness never knew of it; that he did not give plaintiff permission to leave his property in the building; that afterwards, when Amspaugh asked witness if he might use some old stuff remaining in the building, and promised in consideration of it to do some repairs, witness told him to use the property he found there, supposing it to be some abandoned and worthless stuff left by outgoing tenants.

Mr. and Mrs. Amspaugh testified to the effect that, when they went into the building, they found there, and reported to defendants, certain property, and offered, if defendants would give the same to them, they would make certain repairs to the building; that defendants consented to this, and Amspaugh partly consumed and partly sold the property; that it was of small value. Mrs. Amspaugh testified that she told Baily what kind of property was in the house, and he told her to use and consume it.

This was all the evidence, and the court gave the two following instructions.

For the plaintiff:

"The court instructs the jury that if they find from the evidence that the defendants had possession and charge of the property described in the plaintiff's petition, and that said property belonged to plaintiff, and if the jury further

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find that defendants wrongfully converted said property to their own use, or disposed of the same without plaintiff's consent, then they must find for the plaintiff, and assess the damages at such sum as they find that said property was actually worth; and may allow 6 per cent. interest from the time of the conversion."

The defendants excepted, and asked the following instruction, which the court also gave:

"The jury are instructed that there is no evidence in this case showing any agreement of defendants to store the goods sued for in this case for plaintiff; and unless the jury find from the evidence that they knew the property was in the building on Broadway at the date they rented it to Mr. Amspaugh, and knew it belonged to plaintiff when they gave Mr. Amspaugh permission to use it, they will find for defendants."

The jury found a verdict, on November 3, 1873, for plaintiff, in the sum of $112.89. Plaintiff remitted $12.89, and judgment was given for $100.

1. We see no cause for disturbing this judgment. There was, to be sure, singular carelessness on the part of plaintiff and defendants, but the one did not excuse the other. It was a very cool proceeding on the part of plaintiff, when vacating premises on which he owed a small balance of rent, to send word to his landlord's agents that, by visiting him at a designated spot, they could get this balance and make an arrangement with him for storing some furniture which, for the present, he had left in the vacated building. Defendants deny that they received this message. But, unless they neglected their duty very grossly, they visited and inspected the vacated premises and observed this property; and they must have known that it was there, and that it belonged to the last tenant, unless, indeed, they were so remiss and careless that they paid no attention whatever to the condition of the property in their charge. Their notice was pointedly called to it a short time after the plaintiff had left

the building. They seem to have given the matter no attention, and acquiesced in the proposal of Amspaugh to let him have the articles in consideration of his making certain repairs. If defendants, during all this time, refused to take the trouble of inspecting the property in their charge, they must take the consequences of their neglect. Though Amspaugh might have been sued jointly with them for the conversion of the property, it was not necessary to join him as defendant; and their participation in the unlawful conversion sufficiently appears.

2. It is objected that the testimony of Mrs. Blackwell was inadmissible. It is not worth while to pause on this objection. The error, if it was error, was clearly harmless. The objection is pointed at what she said of David Baily's statement in the justice's court, that he had authorized Amspaugh to dispose of the property of plaintiff; and the fact, thus stated, is proved by Baily himself, as well as by Mr. and Mrs. Amspaugh. The judgment will not be reversed for this reason.

3. The instruction given for the plaintiff is a correct exposition of the law, and is founded on the evidence in the case.

4. We can hardly say as much for the instruction asked by the defendants and given by the court. We think the learned judge who tried the cause was surprised into an inaccuracy when he told the jury that, unless at the time when defendants leased the building to Amspaugh they knew that plaintiff's property was in the building, they must find for defendants. If they made this discoveiy on the following day, and then proceeded, either by themselves or jointly with Amspaugh, to convert it, it is not easy to see that they would escape liability. But this instruction merely gave the defendants a chance of escape to which they were not legally entitled. They cannot complain of it, and plaintiff does not.

5. It is said that this instruction is inconsistent with that

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given for the plaintiff. If this were so, the instruction for plaintiff being correct, defendants can have no advantage in this court from the conflict. It may have aided, or tended to aid, them in the Circuit Court, but that is all past. We do not perceive the conflict. We see no evidence of any contract between plaintiff and defendants for the storing of the goods of the former. But, nevertheless, as defendants had possession and charge of the house in which they were, there is no impropriety in considering them as having possession and charge of the goods. The expression is rather loose; but we cannot perceive that defendants could have been injured by it. The other judges concurring, the judgment is affirmed.

ALONZO W. SLAYBACK *et al.*, Appellants, *v.* WILLIAM GERKHARDT *et al.*, Respondents.

February 28, 1876. 1 333 / 41 496 / 1 333 / 54 116

It is not error to instruct a jury directly upon the legal effect of facts which are admitted, or which are so clearly proved, without countervailing testimony, as to be beyond dispute.

APPEAL from St. Louis Circuit Court.

General term reversed; special term affirmed.

Slayback & Haeussler, for appellants, cited: Henshaw *v.* Dutton, 59 Mo. 139; Blakely *v.* Benecke, 59 Mo. 193; Sutter *v.* Lachmann, 39 Mo. 91; Quinn *v.* Illinois Central R. R. Co., 51 Mo. 496; Wharton *v.* Douglas, 76 Penn. St. 276; Free *v.* Hawkins, 8 Taun. 92; Hill *v.* Gow, 4 Barr (Penn.), 493; Lane *v.* Price, 5 Mo. 101; Jones *v.* Jeffries, 17 Mo. 577; Massman *v.* Holscher, 49 Mo. 87; Peers *v.* Davis, 29 Mo. 184; Reed *v.* Jones, 8 Wis. 392; Smith *v.* Williams, 1 Murph. (N. C.) 426; C. & H. Notes on Ph. on Ev. 1466, 1467; Deere *v.* Plant, 42 Mo. 60;

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McKown *v.* Craig, 39 Mo. 156; Hays *v.* Bell *et al.*, 16 Mo. 496; Aubuchon *v.* Boon, 10 Mo. 443; Lee *v.* David, 11 Mo. 116; 13 Mo. 567; Whitney *v.* State, 8 Mo. 165; Hughes *v.* Ellison, 5 Mo. 110; Parker *v.* Fick, 2 Dev. & B. (N. C.) Eq. 195; Martin *v.* Hamlin, 18 Mich. 359; Kincaid *v.* Doemey, 47 Mo. 346; Gooch *v.* Conner, 8 Mo. 391; Lampleigh *v.* Brathwait, 1 Smith's Ld. Cas. 222.

Jones & Johnson, for respondents.

LEWIS, J., delivered the opinion of the court.

Plaintiffs sued before a justice of the peace, where they obtained judgment on a promissory note, as follows:

"*St. Louis, January 24, 1873.*

"Within sixty days from this date we, or either of us, promise to pay to Slayback & Haeussler the sum of $200, for and in consideration of legal services and counsel by them, in behalf of parties interested in retaining the Union Market at its present location.

"WM. GERKHARDT.

"H. W. LEOPOLD."

Defendants appealed to the Circuit Court, where judgment was again given against them, which, on their appeal, was reversed in general term.

The execution of the note was admitted, and defendants undertook to prove failure of consideration. They introduced a mass of irrelevant facts, from no one of which, nor from all together, can be extracted any semblance of such failure. The final action of the city authorities was what the defendants desired; but the latter "did not know" what the plaintiffs had done to bring about that action, nor did it appear that they had taken any steps to inform themselves. There was no testimony even tending to show that the plaintiffs had omitted anything required of them by professional duty to their clients.

The court instructed the jury to find for the plaintiffs, and assess the damages at the sum of $200, with interest at 6 per cent. from the maturity of the note.

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No brief being filed for the respondents, we can only conjecture the ground upon which the general term reversed the judgment in favor of plaintiffs. The only exception saved by defendants was to the giving of the instruction above mentioned. This, perhaps, was considered as too broad, and as taking the issues of fact away from the jury. But we do not so regard it. It is well settled that a court may properly charge the jury directly upon the legal effect of admitted or uncontroverted facts in the case. This is not an instruction upon the weight of evidence, but upon the legal effect of facts admitted and proved, without a single countervailing item in the testimony on either side, and not open to question or dispute. *Hedgepeth* v. *Robertson*, 18 Texas, 871.

The other judges concurring, the judgment of the general term is reversed and that of the special term affirmed.

THOMAS Y. BIRKS, Plaintiff in Error, *v.* JAMES H. RUSSELL, Defendant in Error.

February 28, 1876.

A justice of the peace has no jurisdiction of an action on a covenant of warranty contained in a conveyance of land.

ERROR to St. Louis Circuit Court.

Affirmed.

Bond & Kinealy, for plaintiff in error, cited: Jackway *v.* Barrett, 38 Vt. 326; Goenew *v.* Schroeder, 8 Minn. 387.

F. Garvey, for defendant in error.

GANTT, P. J., delivered the opinion of the court.

Birks sued Russell before a justice of the peace, declaring that Russell had conveyed to him a tract of land in St. Louis county with covenants of warranty. He assigned a breach of this covenant, and asked for damages amounting to $92.89 and interest.

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The case was dismissed by the justice, as being beyond his jurisdiction. The Circuit Court, on motion of defendant when the case was before it on appeal, made the same disposition of it. Plaintiff sued out a writ of error to this court.

We make the same ruling. The statute expressly declares that justices of the peace shall not have cognizance "of any action where the title to any land or tenements shall come in question." 2 Wag. Stat. 810.

This action is brought for an alleged breach of a covenant for title to land. The judgment of the Circuit Court is affirmed, all the judges concurring.

1	336
41	403
1	336
75	170
1	336
78	488
79	494

Franklin Savings Institution, Respondent, *v.* Appolonia Heinsman, Appellant.

February 28, 1876.

The rule by which personal property, when lost or stolen, may be reclaimed by the owner, under all circumstances, does not apply to negotiable securities. Upon grounds of public policy a *bona fide* purchaser of negotiable paper, for value, without notice, becomes the owner of the same, notwithstanding any defect in the title of the person from whom he acquired it.

Appeal from St. Louis Circuit Court.

Reversed and remanded.

Aug. Rebenack, for appellant, cited: Horton *v.* Bayne, 52 Mo. 531; Hughes *v.* McAllister, 15 Mo. 296; Benoist *v.* Siter, 9 Mo. 657; Chitty on Bills, 221, 222; Hall *v.* Wilson, 16 Barb. 548; Hamilton *v.* Marks, 52 Mo. 78; Murry *v.* Gardner, 2 Wall. 121; Welch *v.* Sage, 47 N. Y. 143; Brush *v.* Scribner, 11 Conn. 388.

J. Taussig, for respondent, cited: Murry *v.* Gardner, 2 Wall. 110; Savey *v.* Hays, 20 Iowa, 25; Coursey *v.* Curtis, 18 Ga. 237; Graff *v.* Shannon, 7 Iowa, 508; Kenhue *v.* Williams, 1 Duer (N. Y.), 597; Pars. on Con. (4th ed.) 436;

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Pars. on Con. (5th ed.) 520; McGrew *v.* Browder, 14 Mart. L. (La.) 17; Roland *v.* Gundy, 5 Ohio, 202; Browning *v.* McGill, 2 Har. & J. (Md.) 308; Dame *v.* Baldwin, 8 Mass. 518; Lance *v.* Cowan, 1 Dana (Ky.), 195; Ventress *v.* Smith, 10 Pet. 161; Hoffman *v.* Carow, 22 Wend. 285; White *v.* Sweeney, 4 Daly (N. Y.), 223; New Orleans *v.* Strauss, 25 La. 50; Graves *v.* American Exchange Bank, 17 N. Y. 208.

LEWIS, J., delivered the opinion of the court.

This was a suit in replevin for the recovery of five negotiable promissory notes of the value of $850. Plaintiff obtained possession of the notes under an order of delivery, and recovered judgment in the Circuit Court.

The testimony tended to prove that the notes, indorsed in blank, were in the lawful custody of the plaintiff for collection; that long before their maturity they were stolen from plaintiff by one Rodell, who, adding his own indorsement, sold and delivered them to defendant. Defendant offered to prove that she paid value for the notes before their maturity; that she received them from Rodell in good faith, and used due and reasonable caution in taking them, and that plaintiff had proceeded to hold Rodell, who was one of plaintiff's employés at the time of the larceny or embezzlement, pecuniarily responsible for the same. This testimony was excluded by the court, and, under a general instruction to that effect, the jury rendered a verdict for the plaintiff.

The plaintiff's counsel refers us to Parsons on Contracts, and other authorities, for the general doctrine that, "if a mere finder, and still more a thief, sells what he has found or stolen, the original owner may reclaim his property, wherever it may be, and take it without any payment to the holder, any more than if that holder were the thief himself." That this is the general rule as to personal property no one will deny. But, from the case of *Miller* v. *Race*, which was decided by Lord Mansfield, to the present time,

commercial paper has universally been held to constitute an exception. Upon grounds of public policy, growing out of the commercial necessities and wants of the community, a *bona fide* purchaser of negotiable paper for value becomes the owner of the same, notwithstanding any defect in the title of the person from whom he acquired it. A distinction is here suggested between such defects of title as arise out of mere fraud and those which originate in felony. Where other descriptions of personal property are concerned, such a distinction is recognized for some purposes. But none has ever been made in cases of negotiable paper.

The English and American authorities by which the exception mentioned is established are very numerous. They are so uniform in tenor and effect that but two or three need be here specially noticed.

Story, in his treatise on Bills of Exchange, after remarking upon the operation of a blank indorsement, says: "Another consequence of this doctrine is that if the bill should, after such blank indorsement, be lost or stolen, or fraudulently misapplied, any person who should subsequently become the holder of it *bona fide* for a valuable consideration, without notice, would be entitled to recover the amount thereof, and hold the same against the rights of the owner at the time of the loss or theft." Here he refers to a long list of English authorities.

In *Hall* v. *Wilson*, 16 Barb. 550, a promissory note was stolen from the desk of the maker by a laborer in his employ, and transferred, for value, to an innocent purchaser. The court, upon a careful review of the authorities, declared the rules, a conformity with which will entitle such a purchaser to hold the note against the rights of the loser or original owner. They may be thus epitomized: (1) he must have acquired the title in good faith; (2) he must have become the purchaser for a full and fair consideration; (3) the note or bill must have been taken by the holder in the usual course of his business; (4) it must be taken with-

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out notice to him who receives it of the defect or infirmity of title in him who transfers it. These elements being all present, the rights of the holder will be sustained by the courts against all the world. Of course, as affecting the question of notice, the purchase of the note or bill must have been made before its maturity.

In *Murry* v. *Lardner*, 3 Wall. 121, the fire-proof safe of Lardner had been broken open in the night-time, and three coupon bonds stolen therefrom. These were negotiated in Wall street on the following morning. It was held that the purchaser of them in good faith was unaffected by want of title in the vendor. Swayne, J., delivering the opinion of the court, said: "The general rule of the common law is that, except by a sale in market overt, no one can give a better title to personal property than he has himself. The exemption from this principle of securities transferable by delivery was established at an early period. It is founded upon principles of commercial policy, and is now as firmly fixed as the rule to which it is an exception." Reference was made to the case of *Gill* v. *Cubitt*, 3 B. & C. 466, wherein Abbott, C. J., had instructed the jury that, if the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant. The United States Supreme Court denies this doctrine, and approves that of Lord Denman, in *Goodman* v. *Harvey*, 4 Ad. & E. 870, which gave to the former "a final blow." The latter formed the basis of the decision in *Goodman* v. *Simonds*, 20 How. 343, in which "the subject was elaborately and exhaustively examined, both upon principle and authority." It results that the following is the "settled law" of that august tribunal touching commercial securities transferable by delivery:

"The party who takes such paper before due for a valu-

able consideration, without knowledge of any defect of title, and in good faith, holds it by a valid title against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession."

If it be possible to go a step further for the protection of a *bona fide* purchaser of such paper, this was done in the case of *Seybel* v. *The National Currency Bank*, 54 N. Y. 288. There the bonds were stolen from plaintiff in the evening, and printed notices of the theft, describing the bonds, were laid on the defendant's desk the next morning. Afterwards, in the course of the same forenoon, defendant purchased the bonds from an unknown party. The printed notices of the theft proved insufficient to impair the title acquired by defendant, in the absence of direct proof of bad faith in the purchase.

In view of the principles thus settled by the highest authority, it seems clear that the defendant in the present case offered to prove more than was necessary for a successful defense. The court erred, therefore, in excluding her testimony, and, for this error, the judgment must be reversed and the cause remanded. The other judges concur.

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1 340
37 371

WILLIAM SELKING, Appellant, *v.* LOUIS HEBEL, Respondent.

February 28, 1876.

1. **In the absence of proof to the contrary, the laws of another State will be presumed to be the same as our own.**
2. **The record of an imperfectly acknowledged chattel mortgage imparts no notice.**

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3. The purchaser of a chattel from a mortgagor in possession will hold against a mortgage not sufficiently acknowledged, though it be copied and indexed in the office of the recorder of deeds, and though the purchaser have actual knowledge of its existence.

4. The value of a chattel in dispute being admitted by the pleadings, nothing appears to warrant an interference with the discretion of the trial court in refusing to allow an amendment in that particular at the close of plaintiff's case.

APPEAL from St. Louis Circuit Court.

Affirmed.

Finkelnburg & Rassieur, for appellant, cited: Story on Part. (6th ed.), sec. 94; Hill. on Mort. (4th ed.) 350, 351; Smith *v.* Hutching, 30 Mo. 380; Fairbanks *v.* Bloomfield, 5 Duer (N.Y.), 434, 440; Thornton *v.* Davenport, 2 Ill. 296; Edwards *v.* Harbens, 2 T. R. 587; Hathorn *v.* Lewis, 22 Ill. 395; Lewis *v.* Palmer, 28 N.Y. 272; Allen *v.* McCalla, 25 Iowa, 465; Schouler on Pers. Prop. (ed. 1873) 542; Ill. Stat. 1858, p. 873.

Hill & Bowman, *Slayback & Haeussler*, for respondent.

BAKEWELL, J., delivered the opinion of the court.

This was an action of replevin brought by appellant against respondent for the possession of a large musical instrument called an "orchestrion." The property was taken from defendant, under the statute, and delivered to appellant. Its value is stated in the petition and accompanying affidavit to have been $2,100.

It appears that plaintiff, residing in Indianapolis, Indiana, had the orchestrion in his possession on May 14, 1873, and at that date sold the same to Kestring & Kelly, a firm that had recently removed from Indianapolis to Quincy, Illinois, where they were carrying on business at the time of the sale. The sale was made with knowledge that the vendees would remove the orchestrion to their saloon in Quincy. It was sold for $2,100, of which $1,000 was paid in cash, and for the unpaid balance the notes of the purchasers were taken; one note at sixty days for $100, and five notes of $200 each, payable respectively in three, four, five, six, and

seven months, secured by a chattel mortgage on the instrument. The mortgage stipulated that the mortgagor might retain possession until default, in which event the mortgagee might seize the mortgaged property, wherever found. The mortgage also provides that the mortgagee may at once take possession if the orchestrion is removed without his consent. The mortgage is under seal, and signed "Kestring & Kelly, by Edward Kelly," who was one of the firm. There is attached to the mortgage a certificate of acknowledgment before a notary of Marion county, Indiana, the place in which it was executed, and in which the mortgagee resided, setting forth that, on the day named, "before me personally appeared the firm of Kestring & Kelly, by Edward Kelly, to me well known, and acknowledged the execution of the foregoing instrument as their free act and deed." The orchestrion was at once delivered to Kestring & Kelly, in Quincy, and the mortgage at the same time recorded in the county in which Quincy is situated. None of the notes were paid, and the orchestrion was, in October, 1873, sold to defendant by Kestring & Kelly, and delivered by them to him at St. Louis, of which sale and removal plaintiff had no knowledge at the time. Defendant paid $1,000 for the instrument, but, on the trial, swears "it was worth just nothing; I would not have it back for anything." Before purchasing, defendant sent a telegram to Indianapolis, to one Renman who kept a saloon next door to plaintiff, and whose address plaintiff got from Kestring & Kelly, asking, "How much claim do you hold on the orchestrion?" Plaintiff swears that this telegram was at once communicated to him, and that he immediately answered, both by telegraph and mail, to defendant's correct address in St. Louis, saying in his telegram that he had a mortgage for $1,100, and giving full particulars by letter. Defendant swears that he did not receive either letter or dispatch. After the lapse of two weeks, plaintiff went to St. Louis, and found the orchestrion in defendant's saloon,

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who at first said that he had imported the orchestrion from Germany at a cost of $4,000; but, on being informed who plaintiff was, and what claims he made to the orchestrion, defendant at once told him that he had bought the orchestrion as already stated, and promised to pay $1,000, as a compromise, in full discharge of plaintiff's mortgage. This he subsequently refused to do, and this suit was commenced.

On the trial, plaintiff offered additional evidence to show actual knowledge, on part of defendant, of plaintiff's mortgage, before purchase; but the court refused to admit evidence on that point, on the ground that such knowledge on defendant's part was immaterial.

Plaintiff then asked leave to amend his petition as to the value of the property, which the court also refused.

The court, at the close of plaintiff's case, instructed the jury that, "on the evidence, plaintiff is not entitled to recover, and they will assess the value of the property at the sum of $2,100, as admitted by the pleadings, and assess one cent damages for the taking and detention thereof."

To all these rulings plaintiff excepted.

The jury rendered a verdict in accordance with the instruction. A *remittitur* was entered of $1,000, and judgment entered against plaintiff for $1,000.

After moving for a new trial, which motion was overruled, plaintiff brings the case here by appeal.

The first question that presents itself for our determination is as to the action of the court below in refusing to allow evidence of actual notice of the alleged mortgage.

It does not appear that any evidence was introduced on the trial as to the law of Illinois in regard to acknowledgments of deeds. Of the laws of our sister States, courts in Missouri do not take judicial notice. In the absence of proof to the contrary, they will be presumed to be the same as our own. The Indiana statutes in regard to acknowledgments and chattel mortgages were introduced, and also Gross' Statutes of Illinois, page 67, section 3, in regard

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to the record of chattel mortgages. Nothing, however, appeared from which the learned judge below could determine the sufficiency of the acknowledgment under the Illinois law. He might well, therefore, presume it to be no compliance with the statute of Illinois, as it would have been clearly bad in Missouri, and, indeed, on the argument before us it seems to have been conceded that the mortgage was not certified as required by the law of Illinois. The record of a chattel mortgage insufficiently acknowledged imparts no constructive notice, even in the State and county in which it is made. We consider that the case is as if this mortgage had never been recorded at all. But the purchaser of personal property from a mortgagor in possession will hold against a prior unrecorded mortgage, even though he had actual knowledge of it. *Bryson* v. *Penix*, 18 Mo. 13. The court below, therefore, committed no error in excluding evidence of actual notice to defendant of this mortgage.

The value of the property was admitted by the pleadings, and it was within the discretion of the trial court to refuse to allow an amendment in this respect, at the close of plaintiff's case. We see nothing to warrant an interference with the exercise of that discretion in this instance. In this view of the case there was, therefore, no error in the instructions given; and, no error of any kind appearing on the record, the judgment of the Circuit Court must be affirmed. The other judges concur.

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AMADEE VALLÉ, Defendant in Error, *v.* JAMES C. FARGO, Trustee of AMERICAN EXPRESS COMPANY, Plaintiff in Error.

February 28, 1876.

1. In a lease, dated June 7, 1849, for a term of twenty years, ending June 6, 1869, a covenant on the part of the lessee to pay "all taxes whatsoever to

be levied during the term, including the taxes for the year 1849," did not bind the lessee to pay the taxes for the year 1869. Though these were assessed before the end of the term, they were not leviable, either by the law in force in 1849, or by that in force in 1869, before June 7, 1869.

2. The word "levy" is synonymous with "collect," or "raise by execution," and is entirely distinct from "*assess*."

3. "Levy" and "assess" are not convertible terms as applied to taxation. To assess a tax is to declare it payable; to levy it is to collect it.

ERROR to St. Louis Circuit Court.

Reversed and judgment.

Daniel Dillon, for plaintiff in error, cited; Curtiss *v.* Miller, 17 Barb. 477, 479, 480; Sheppard *v.* Spaulding, 4 Metc. 416; Taylor's L. & T., sec. 518; Vin. Abr., title Surrender (A 2), sec. 7; Com. Dig., title Surrender (L); Shep. Touch. 300, 301; 3 Washb. on Real Prop. (3d ed.) 474; Bain *v.* Clark, 10 Johns. 424; Sperry *v.* Miller, 4 Seld. (N. Y.) 336; Meyer *v.* Lowell, 44 Mo. 328; Lawrence *v.* Fox, 20 N. Y. 268; Page *v.* Becher, 31 Mo. 466; Manning *et al.* *v.* Frazer's Admr., 27 Mo. 420.

George P. Strong and *T. W. Blackman*, for defendant in error, cited: Taylor's L. & T. (2d ed. 1852), secs. 372, 373, 516; O'Fallon *v.* Nicholson, 56 Mo. 240; Blossom *v.* Van Court, 34 Mo. 394; 5 Taun. 518; 1 Greenl. on Ev. (2d ed.) 55, 522, 523, 528, 531; 2 Ph. on Ev. (4 Am. ed.) 34, 35, note 268, p. 37; Arnold *v.* Arnold, 17 Pick. (Mass.) 8, 9, 13; Harvey *v.* Richards, 2 Gall. 229; Burr *v.* Bigler, 16 Abb. (N. Y.) Pr. 183; Davis *v.* Talcott, 12 N. Y. 188; Morgan *v.* Plumb, 9 Wend. 293; Colburn *v.* Woodworth, 31 Barb. 381; Green *v.* Clark, 5 Den. (N. Y.) 505; Bank of Missouri *v.* Benoist *et al.*, 10 Mo. 524; Felton *v.* Dickinson, 10 Mass. 290; Arnold *v.* Lyman, 17 Mass. 404; Meyer *v.* Lowell, 44 Mo. 330; Flanigan *v.* Hutchinson, 47 Mo. 239; Rev. Stat. 1845, p. 927, sec. 1; Session Acts 1865, p. 112, secs. 1, 2, p. 954, sec. 4; Session Acts 1867, p. 157, sec. 3; State *v.* Clerk of Jefferson County, 41 Mo. 588; City of St. Joseph *v.* Hannibal & St. Jo. R. R. Co., 39 Mo. 477; State

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v. Dalle, 48 Mo. 282; Egyptian Lever Co. *v*. Hardin, 27 Mo. 497; Northern Liberties *v*. St. John's Church, 1 How. 10; St. Louis Building and Savings Assn. *v*. Lightner, 42 Mo. 425; Wag. Stat. 1159; City of Carondelet *v*. Picot, 38 Mo. 130; Taylor's L. & T. (6th ed.), sec. 398; Mayor and Council *v*. Cashman, 10 Johns. 96, 97; Oswald *v*. Gilbert, 11 Johns. 443; Wilkinson *v*. Libbey, 1 Allen (Mass.), 375; Port *v*. Kearney, 2 N. Y. 396; Shepardson *v*. Elmore, 19 Wis. 428; Bleeker *v*. Ballou, 3 Wend. 263, 266; Astor *v*. Miller, 2 Paige (N. Y.) Ch. 68, 70, 74; Palmer *v*. Warren Ins. Co., 1 Story, 364; Webb *v*. Perpetual Ins. Co., 14 Mo. 3.

GANTT, P. J., delivered the opinion of the court.

This action was brought on a lease dated June 7, 1849, executed by Vallé to Michael, and by him assigned to defendant. It created a term, commencing on June 7, 1849, and ending June 6, 1869, and, among the covenants, was the following on the part of the lessee, viz.: To pay the yearly rent of $800 in quarterly payments, "and all taxes whatsoever to be levied during the term of this lease, including the taxes for the year 1849." The petition alleged that this covenant was broken, in that the taxes for the city, State, and county for the year 1869 were $586.24, and that defendant had refused to pay this sum. That plaintiff paid it, and he asks judgment for the amount and interest.

The defendant denied all the allegations of the petition, except the making of the lease, and its assignment, and set up a counter-claim. Plaintiff filed a reply.

The cause was tried at great length, and many questions are presented by the record which we do not consider essential to the determination of the controversy, under the view we take of the covenant declared on. The meaning of the words employed, omitting "including the taxes for the year 1849," was that lessee should pay all taxes

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levied during "the term of this lease." What was that term? Twenty years, beginning in 1849 and ending in 1869. When would the first payment become due, under this covenant, as to taxes?

It was assumed at the argument that the covenant was to pay "all taxes whatsoever to be ASSESSED during the term." We have seen, by an examination of the record, that "it was to pay" all taxes * * * LEVIED during the term." There is a wide difference between the two things. To assess a tax is to declare a tax to be payable; to levy it is to raise or collect it. Bouv. L. Dic. title Levy. One of the first things done by the Parliament of England, after the revolution of 1688, was to pass an act declaring that, "*to levy money* for or to the use of the crown by pretense of prerogative, without grant of Parliament, is illegal." 1 Bla. Com. 140. When an execution is issued for money, and comes into the hands of an officer, the *levy* of it—the *satisfaction* of it—is made by *seizing* the property of the defendant. Wag. Stat., sec. 19, p. 606. To be sure, the conversion of the thing seized into money is made before the execution is, in common parlance, said to be satisfied. But a levy is *prima facie* a satisfaction.

We think it is plain that there is a wide difference between taxes assessed and taxes levied, and no tax can be levied until the assessor's return is made and acted on by the County Court, and the books placed in the hands of the collector. This could not have been done, in the year 1849, before July, at any rate, as may be seen by the citations made in *Blossom* v. *Vancourt*, 34 Mo. 390. Hence, the State and county tax for the year 1849 could not have been *levied* until after the commencement of the term created by the lease in this cause.

This disposes of the matter, even if there had been no addition of the words, "including the taxes for the year 1849." This was only saying that the lessee should by all means, and without doubt, pay the taxes for 1849, as part of those for which he stipulated.

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No taxes were leviable for State, city, or county purposes, in 1869, before June 6th, and none were actually levied. It is admitted that the taxes for 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, and 1868 were all paid—that is, they were paid for twenty years, including 1849. That is all which was demandable of the lessee under the lease before us. It follows that plaintiff had no cause of action. The judgment of the Circuit Court is reversed, with costs, and final judgment is given for the defendant in this court. All the judges concur.

GANTT, P. J., delivered the opinion of the court on motion for a rehearing.

A motion for rehearing has been filed in this cause, and, as the question presented may be of interest to the bar, we give at some length our reasons for overruling the motion. The case is one in which our decision is final, which is another reason for the careful consideration of all that is urged on the motion for a rehearing. We gave the case full examination before delivering the opinion already filed, but, while our first aim in the decision of causes is to determine them according to law, our second wish is to make every suitor understand that everything he has urged has received a full, cautious, and patient consideration.

When the case was decided it seemed to the whole court that no difficulty was presented by the record, and that the error committed by the Circuit Court was manifest. All that we aimed at in our opinion was the clear enunciation of the views on which we reversed the judgment. As this court is of only limited ultimate jurisdiction, our general rule is to make our opinions as brief as is consistent with the avoidance of obscurity. From the earnestness with which the counsel for respondent press their motion for a rehearing, we are induced to think that we may in this instance have carried this rule too far, and this impression is strengthened by the observation that the point which

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struck the whole court on the statement of the case, and which is, in our opinion, decisive of the controversy, seems to have escaped the attention of both the counsel and the court below, although it is apparent, as we think, on the face of the record. It is, therefore, our intention to give some expansion and elucidation of the views we entertain. It is not our purpose to invite litigants, as a general thing, to reargue their cases on motion for a rehearing. One decisive objection to such a practice is that it would inevitably lead to a slovenly style of arguing them in the first instance, and the delay consequent on it would be intolerable. Nor do we propose, in general, to state our reasons for overruling such a motion. But we invite the bar to scrutinize all our opinions, and if they point out an error in them we shall feel that a service has been done to ourselves, while their client's interests have been promoted by this performance of their duty.

We have bestowed great, and, as we must think, disproportioned, attention on all that is urged by the counsel for the respondent, and remain convinced that the judgment of the court and the opinion as originally delivered should not be varied or qualified. What follows is a statement of our reasons for this conclusion.

The question being as to the liability of a party who, on June 6, 1849, covenanted to pay all taxes whatsoever to be levied on certain demised premises during the term of this lease (the term commenced June 6, 1849, and continued for twenty years thereafter), including taxes for the year 1849, the respondent, in his motion for a rehearing, argues two propositions. First, that "levied" is synonymous with, and equivalent to, "assessed" in this covenant. Second, that by this covenant the lessee covenanted to pay, not only all taxes *assessed* (not levied) during the term of twenty years created by the lease, including *the taxes for* the year 1849, but also the taxes assessed during the term, and payable after its close during the year 1869; so that

the lessee should, first and last, pay taxes for a term, not of twenty years, but of twenty-one years. The argument in support of these propositions consists, of course, in maintaining that "levy" means "assess," and that "including" means "in addition to."

On the first point they cite expressions from some of the statutes of the State which they think countenance the idea that the terms "levy" and "assess" are convertible.

They omit all reference to the revenue act of 1845, which was in force when this covenant was made, and it may be that the provisions of this statute, which are unusually explicit in marking the different senses in which the General Assembly used these different words, escaped the observation of the counsel for the respondent. We propose to cite them in elucidation of our views.

The counsel for respondent also detach from their context certain sentences occurring in the course of opinions delivered from time to time by the Supreme Court of Missouri, and argue that it thus appears that the court of last resort considered "levy" and "assess" to be convertible terms. What the respondent's counsel say on this head, indeed, goes further. They not only impute to the Supreme Court the use of the word "assess" in the sense of "levy," and of "levy" in the sense of "assess," but seem to deny that these terms have, in any case cited by them, been used by the Supreme Court of Missouri in the senses which this court thinks appropriate to them. We will not dwell upon this branch of the argument for the rehearing. Nothing but a reference to the passages cited is, in our judgment, needed to completely vindicate the Supreme Court from the imputation we have mentioned. It is not contended that, in any case decided by that court, the question was made of the distinction between the meaning of these two terms. We content ourselves with saying that it appears to us that in the use of these words the Supreme Court was fully aware of, and assented to, the definitions of them which

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are to be found in the authorities we proceed to cite, and that it used the words in question in the same sense which, for more than 300 years, they have borne in England and America.

We quote from Jacob's, Tomlin's, Burrill's, and Bouvier's law dictionaries, and from the unabridged editions of Webster's and Johnson's dictionaries of the English language. The first are, of course, the most authoritative; but we might rely on the last alone, so little do they differ from the first in ascertaining the meaning of these terms of art. We then quote the statutes of 1845, and the latest act on the subject of revenue to be found in our General Statutes.

Jacob's Law Dictionary defined *assessors*, or *assisors*, or *assessores*, by a Latin sentence, which he leaves untranslated: "*Sunt qui assisas condunt, aut taxationes imponunt.*" The Latinity is barbarous enough, but the meaning is perfectly plain: "Assessors are those who make assessments or impose taxes."

Burrill's Law Dictionary, title "Assess": "To rate or tax; to fix or settle a sum to be *levied* or paid."

Bouvier's Law Dictionary: "Assessment is the making out a list of property, and fixing its valuation or appraisement; it is also applied to making out a list of persons and appraising their several occupations, chiefly with a view of taxing the said persons and their property."

Jacob's Law Dictionary, title "Levy." He says: "The term is used in the law for 'to collect,' or 'exact,' as to levy money, etc. Sometimes it signifies to exact or cast up, as to levy a ditch," etc.

Id. "Levying money without consent of Parliament. No subject of England can be constrained to pay any aids or taxes for the defense of the realm or the support of the government but such as are imposed by his consent or that of his representatives in Parliament," etc.

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Id. "*Levari facias.*" "A writ of execution directed to the sheriff for *levying a sum of money* upon a man's lands and tenements, goods and chattels," etc.

Tomlin's Law Dictionary, title "Levy." He seems to have followed Jacob almost literally. (9 *v.*)

Burrill's Law Dictionary, title "Levy." "To collect by execution. Executions are usually indorsed with a direction to the sheriff to *levy* so much money," etc.

Burrill (*loco citato*) derives the word, as of course every one else does, from the Latin *levo*, or the French *lever*, both signifying to *raise*. He adds: "In old English law 'to raise or lift up.' * * * To *levy a tax* had the same radical sense 'of raising.'"

Bouvier's Law Dictionary, title. "Levy:" "A seizure; the raising of money for which an execution has been issued." The author then goes on to show what acts are necessary to constitute a valid *levy*, in order to which "the sheriff must have the property within his power and control, or, at least, within his view." It may be remarked that our statute, from 1845 to the present time, requires the same formalities, and perhaps is still more strict. Its words are (1 Wag. Stat. 1872, p. 606, sec. 18; Rev. Code of 1845, p. 489, sec. 67): "The word levy, as used in this act, shall be construed to mean the actual seizure of property by the officer charged with the execution of the writ." Every lawyer knows that the object of this statute was to prevent the fraudulent or constructive *levy* from working hardship to an innocent purchaser.

We come now to Webster's and Johnson's dictionaries.

Webster: "Assess. 1. To set, fix, or charge a certain sum upon, as a tax; as, 'to assess each citizen in due proportion.' 2. To value; to fix the value or profits of, for the purpose of taxation."

"Levy. 1. To raise or give up, as a siege. [*Obs.*] 2. To raise or collect; said of troops, etc. 3. To raise or

collect by assessment; as to levy taxes, toll, tribute, or contributions. 4. (*Law.*) To gather or exact; as to levy money," etc.

Johnson's (Quarto) Dictionary: "Assess. To charge with any certain sum."

Id. "Levy. (*Lever*, French.) To raise; to bring together, applied to men. 2. To raise, applied to money," etc.

Our statute of 1845 on the subject of the revenue is divided into six Articles. The 1st declares what property shall be taxed and what shall be exempted from taxation. The title of the 2d Article is: "Of the assessment of property for taxation." This title tells the whole story. It would suffice, we think, without another word, but we go on. The 3d is entitled: "Of the collection of the revenue, and miscellaneous provisions." Reading this chapter, we come to section 23, the marginal summary of which is: "Power of collector to *levy* on and sell personal property." The section itself declares * * * "they [the collectors] shall have power to seize and sell the goods and chattels of the person liable for the tax," etc.; and section 25 says, "whenever taxes shall be *levied* by the sale of goods, in addition to the amount of the tax, the collector shall *levy* the necessary costs of the proceeding, and 10 per centum on the amount of the tax, for his trouble." Section 119, page 1183, of Wagner's Statutes of 1872, on the subject of *revenue*, uses the word *levy* in the same sense. We do not quote it at length.

Now, we cannot understand how any person, even if previously ignorant of the meaning of the terms "assess" and "levy," can read the Missouri statute, chapter 147 of the Digest of 1845, from page 926 to 946, inclusive of both, and remain under any doubt or misapprehension of the sense in which the law-makers of that day used the words. We have assumed that the inquirer is not a lawyer, and that he wished to know what was the import of these terms as used in the statutes of Missouri in 1849. He would naturally

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look to the digest last made of our laws which was in force in 1849, and, turning to the head "Revenue," he would read the chapter, part of which we have cited. If not yet quite satisfied, and desirous of knowing whether the Legislature of Missouri used words in the same or a different sense from that which had been, from time immemorial, consecrated by the Parliament and courts of England, if he should consult the records in which their usages are preserved, he would discover that the law-makers and the legal profession in Missouri were in complete accord with the corresponding bodies in the mother country. If, then, he should examine whether the vernacular agreed with the scientific sense of the words, he would find, by consulting Webster and Johnson, that the agreement was perfect. If, at the end of all this, he was told by courts of justice that all this diligence was to no purpose; that the legal meaning of a term was not only a matter inscrutable by all who had not access to the mysterious volumes which compose a lawyer's library, but that the English language in these volumes was itself a means of misleading the unwary and uninitiated reader; that its meaning was liable to be wrested from its scientific as well as its common signification, in a manner which did equal violence to the principles of exegesis and the common sense of mankind, we would certainly expect him to form and express an opinion in no wise favorable to the law as a science, or to the exposition of it by those who are intrusted with its administration.

We feel that we have dwelt on this subject at unnecessary length, but we believe that we have made it plain that the respondent (plaintiff below) has no right of action against the appellant. We have seen that the tax for the year 1849 was *levied* (that is, raised, or collected) after June 6th, which was the date of the covenant before us; that the tax for the year 1869 was not levied, and was not leviable, until *after June 6*, 1869; that the taxes for the whole term of twenty years, beginning with 1849, have been paid; and

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that the tax now in dispute is the tax of 1869, which was levied after June 6, 1869, and was not by law leviable until after that day—*i. e.*, until after the end of the term. Obviously nothing remains to be decided. Whatever we may think of the second proposition of the respondent is immaterial. If we said anything on that subject, our observations, being unnecessary to the determination of the controversy, would be *obiter dicta*. All courts should shun the utterance of these, and particularly courts which are not of last resort. The motion for a rehearing is overruled, all the judges concurring.

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CASES

ARGUED AND DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS.

MARCH TERM, 1876.

RICHARD F. PARK, Respondent, *v.* SOLOMON G. KITCHEN, Appellant.

March 7, 1876.

1. This court will not set aside the finding of a referee as against the evidence, where there is any evidence to support the finding.

2. Where one having a contract to perform certain work is forbidden to proceed with it by the other contracting party, such a refusal to permit the work to proceed is equivalent to a performance, for the purpose of maintaining an action; and, where the work is thus stopped almost as soon as performance is commenced, the measure of damages is the profit which plaintiff can show, by definite testimony, he would have made if allowed to complete the job—that is, the difference between the contract price and what it would have cost plaintiff to complete the building.

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APPEAL from St. Louis Circuit Court.

Affirmed.

Pope & McGinnis, for appellant, cited: 1 Pars. on Con. (5th ed.) 475; 2 Woodb. & M. 359; 1 Pars. on Con. (5th ed.) 494; Erwin *v.* Bank of Kentucky, 5 La. 4; Fitzgerald *v.* Hayward, 50 Mo. 516.

Leonard Wilcox, for respondent, cited: Scrugham *v.* Wood, 15 Wend. 546; Blanchard *v.* Blackstone, 102 Mass. 347; Verplanck *v.* Sterry, 12 Johns. 546; Baldwin *v.* Chouteau Ins. Co., 56 Mo. 153; Sedg. on Dam. (6th ed.) 75,

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et seq.; 3 Pars. on Con. (5th ed.) 184, note *y;* Fitzgerald *v.* Hayward, 50 Mo. 517; Myers *v.* N. Y. & R. Co., 2 Curt. 38; Hughs *v.* Hood, 2 Curt. 352; Waters *v.* Tower, 20 Eng. Law & Eq. 410; Sedg. on Dam. (6th ed.) 79.

Bakewell, J., delivered the opinion of the court.

This case was tried before a referee. We are asked by the appellant to reverse the judgment of the court below on two grounds:

1. That the finding of the referee is not supported by the evidence; and,

2. That the rule assumed by the referee, for the measure of damages, is incorrect.

These two points alone are insisted upon in the written argument and brief submitted by appellant, and the numerous exceptions to the referee's report may all be classed under one or other of these heads.

The referee was the sole judge of the weight of the evidence, subject to review by the trial court alone. It was no error of law for the court below to refuse to set aside the finding of the referee if there was any evidence to support it. We have carefully read the evidence, and are quite clear that there is evidence of every fact found by the referee, and evidence to support the verdict and judgment. It would, therefore, be against the well-settled law for appellate tribunals in this State for us to interfere unless some error of law were shown in the proceedings; and this brings us to the next question.

It is true that a simple breach of the contract on the part of the defendant, such as non-payment of dues earned, would not authorize plaintiff to stop work, and then recover for unperformed work. *Fitzgerald* v. *Hayward*, 50 Mo. But when, as in this case, defendant refuses to permit a performance on the part of the plaintiff, such a refusal is taken as equivalent to a performance, for the purpose of maintaining this action; and the contract price of the ser

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vices or work is the measure of the recovery of plaintiff, unless it appears that the damages sustained were really less. *Pond* v. *Wyman* is the leading case in Missouri on this point; it has been followed ever since. 15 Mo. 183. The rule will be modified somewhat by the circumstances of each case, as to the exact measure of damages; and, when a contract is let out at lower terms than would be reasonable for portions of the work taken alone, the plaintiff, if prevented from completing his work by defendant, may recover on a *quantum meruit*, and the contract price will no longer govern. In a case like the one at bar, where the work is stopped almost as soon as performance is commenced, and where plaintiff has done little more than let out his sub-contract, the proper measure is the profit which plaintiff can show (not by guess-work, but by positive and definite testimony) he would have made had he been allowed to complete the job—that is, in effect, the contract price less what it would have cost the plaintiff to complete the work. These two essential elements—the contract price and the actual cost at which the building would have been completed by plaintiff—are both shown in this case by very clear, definite, and positive testimony, and no room is left for speculation.

The referee finds, as a matter of law, that the plaintiff is entitled to have judgment for the difference between the sum which he was by contract to receive for building the defendant's house and the sum which it would have cost him to build it at the time when it was under contract to be built; and finds for the plaintiff in the sum of $672.54.

The measure of damages in this case is correctly stated by the referee. There appearing no error on the record, the judgment of the Circuit Court will be affirmed. The other judges concur.

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JOHN D. BROWNLEE, Respondent, v. CHARLES HEWITT, Appellant.

March 7, 1876.

1. Where a false statement as to the value of land, which excludes the possibility of honest error in judgment, is relied upon by a contracting party, and is the proximate cause of the transaction which results in damage to plaintiff, plaintiff is entitled to recover.
2. A false statement as to the value or quality of land may be fraudulent in law, though made in good faith.
3. Where the question is as to real estate, and the facts are peculiarly within the knowledge of defendant, and plaintiff relied on his statements, the negligence of plaintiff in making inquiry will not excuse the defendant.
4. Where counsel are sent out of the court-room to argue the cause to the jury out of the presence of the judge before whom the cause was tried, if improper remarks are made to the jury on either side, calculated to prejudice the jury, a new trial should be granted, on the application of the party aggrieved, unless it clearly appears that no evil result was produced by these remarks.
5. The fact that the party aggrieved consented to argue the cause out of the presence of the court, when requested so to do by the judge trying the cause, does not constitute a waiver of his right to have the argument of the cause conducted in the presence of the court.
6. It is error for a judge to absent himself during the closing argument of the cause before the jury.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Slayback & Haeussler, for appellant, cited: Ried v. Piedmont, etc., 58 Mo. 422; Clarke v. Hammerle, 27 Mo. 55; Mead v. Brotherton, 30 Mo. 201; Tood v. Boone County, 8 Mo. 431; Alexander v. Keer, 2 Rawle (Penn.), 83; Chew v. Caliott, 1 Walk. (Mich.) 84; Knouff v. Thompson, 16 Penn. 357; Kerr on Fr. & Mis. 83, 84; 2 Add. on Torts, 1004; Wannell v. Kim, 57 Mo. 479; Hubbard v. Briggs, 31 N. Y. 518; White v. Merritt, 7 N. Y. 352; Weed v. Case, 55 Barb. 534; Williamson v. Rancy, 1 Freem. 112; Allen v. Hopson, 1 Freem. 276; Dooley v. Jennings, 6 Mo. 61; Bree v. Hollbech, Dougl. 655; Broom's

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Leg. Max. 743; State Bank v. Hamilton, 2 Ind. 457; Oldham v. Bentley, 6 B. Mon. (Ky.) 428; Oberland v. Speiss, 45 N. Y. 169; Nelson v. Luling, 46 How. (N.Y.) Pr. 365; Eames *et al.* v. Morgan *et al.*, 37 Ill. 260; Tryon v. Whitewash, 1 Metc. 1; Hanson v. Edgerly, 29 N. H. 343; Marsh v. Falker, 40 N. Y. 562; Nye v. Merriam, 35 Vt. 438; Collins v. Evans, 5 Q. B. 826; Ormrod v. Huth, 14 M. & W. 664; Muller v. Eno, 14 N. Y 597; Ward v. Reynolds, 32 Ala. 384; Hinckly v. Hendrickson, 5 McLean, 170; Smith v. Smith, 30 Vt. 139; Weiner v. Clement, 37 Penn. 147; Groff v. Hensel, 33 Md. 161.

W. H. Clopton, for respondent, cited: House v. Marshall, 18 Mo. 368; Smith v. Richards, 13 Pet. 26; Monroe v. Pritchard, 16 Ala. 785; Medbury v. Watson, 6 Metc. 246; Glasscock v. Minor, 11 Mo. 657; Buford v. Caldwell, 3 Mo. 477; Anderson v. Jarvis, 4 Bing. 69; Williamson v. Allison, 2 East, 446; Osgood v. Lewis, 2 Har. & G. 495; Paisley v. Freeman, 13 Ves. 133, and 3 T. R. 51; Upton v. Vail, 6 Johns. 181; 3 Johns. 271; 12 Mass. 20; 6 Metc. 246; Foster v. Charles, 6 Bing. 396; Corbet v. Brown, 8 Bing. 83; Freeman v. Baker, 5 B. & A. 797; Hart v. Talmadge, 2 Day (Conn.), 382; Young v. Hall, 4 Ga. 95; Stiles v. White, 11 Metc. 356; Weatherford v. Fishback, 3 Scam. (Ill.) 170; White v. Wheaton, 3 Seld. (N. Y.) 352; Griffith v. Ely, 12 Mo. 517; Holland v. Anderson, 38 Mo. 55; Hall v. Clark, 21 Mo. 415; Irving v. Thomas, 18 Me. 418; Story on Sales, 293–330; Leflore v. Justice, 1 Smed. & M. (Miss.) 381; Otto v. Alderson, 10 Smed. & M. (Miss.) 476; Ross v. Crutzinger, 7 Mo. 245; Ridens v. Ridens, 29 Mo. 469; Mathews v. Elevator Co., 50 Mo. 149; Cornell v. Jackson, 3 Cush. (Mass.) 506; Whitney v. Alliare, 1 Comst. (N. Y.) 305; Van Epps v. Harrison, 5 Hill, 63; Hill. on Torts, p. 32, sec. 26; Hutchinson v. Granger, 13 Vt. 386; Hunt v. Simonds, 19 Mo. 588; Loyd v. Hannibal & St. Jo.

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R. R. Co., 53 Mo. 509; Hill. on New Tr. 225, sec. 40; Hill. on New Tr. 227, secs. 45, 48, 50.

BAKEWELL, J., delivered the opinion of the court.

This is an action for damages in the nature of a writ of deceit against defendant for making false and fraudulent representations, whereby plaintiff was induced to trade off the stock and fixtures of a grocery store, worth $2,500, for certain lands in Illinois and Missouri.

The petition alleges that plaintiff was induced to make the trade by the false and fraudulent representations of defendant, to the effect that the lands were worth that sum, and that the title to them was at the time well vested in one Newkirk, who was to convey the same.

The lands are clearly shown to have been worth less than $800. The testimony of some witnesses puts them down as worth less than $200. It also appears that Newkirk, at the time, had not the legal title to one of the tracts, and that Newkirk's deed executed to plaintiff was worthless, passing no title. As to the other material facts necessary to establish plaintiff's case, the evidence is contradictory. It consists mainly of the testimony of plaintiff and defendant, who contradict each other.

There was a verdict and judgment for plaintiff for $2,300, and, a motion for new trial being overruled, the case is brought here by appeal.

Some exceptions were taken to the introduction and exclusion of evidence; but they are not insisted upon, and need no particular notice.

The appellant relies for a reversal upon the points that the damages are excessive, and that the court erred in granting an instruction at the instance of plaintiff, and in refusing certain instructions asked by defendant.

The only instruction given for the plaintiff was as follows:

"The court instructs the jury that, if they believe upon the evidence that the plaintiff was, on or about September

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2, 1869, the owner of a grocery store in the city of St. Louis, worth a large sum of money, and that defendant did falsely and fraudulently represent to plaintiff that the lands described in plaintiff's petition were good and arable lands, and worth, respectively, from $8 to $25 per acre, and that the title to the said lands in Missouri was vested in one John V. Newkirk; and if they believe that the lands were not good, arable lands, and were, at the time of such representations, of little or no value, and that the title to the said Missouri lands was not in said Newkirk's hands, so as to enable him to convey the same to plaintiff; that said lands were distant from plaintiff's place of residence; and that defendant claimed special knowledge of said lands, and that plaintiff relied on defendant's representations as to character, value, and title of said lands, and that said representations were the material inducement to an exchange made by plaintiff of his grocery store for said lands, and that said Hewitt was benefited by said false and fraudulent representations, they will find for the plaintiff, and assess his damages at an amount equal to the difference they may find between the value of said grocery store, wares, good-will, and fixtures, and the said lands, at the time of said exchange."

The following instruction was given at the instance of defendant.

"The court instructs the jury that, if they believe from the evidence that defendant made no false and fraudulent representations to plaintiff of the value or character or title of the land specified and described in the petition, then they will find for defendant."

These were all the instructions given in the case. The following, asked by defendant, were refused by the court:

1. "If the jury believe from the evidence that there was no acquaintance between plaintiff and defendant prior to the transaction in controversy; that by reasonable diligence

and inquiry, by exercising common and reasonable care, he could have ascertained the title, value, and character of the lands in question; and that defendant was in no manner interested with Newkirk in the purchase of the grocery, then they should find for defendant."

2. "The court instructs the jury that, if they believe from the evidence that defendant sold the lands in question to one Newkirk, for $800; that Newkirk afterwards traded them with plaintiff; and that defendant was in no manner interested with said Newkirk in the purchase or trade with plaintiff, then they will find for defendant."

3. "The court instructs the jury that, if they believe from the evidence that the defendant sold the land in question to one Newkirk, for $800; that Newkirk traded the same land with plaintiff, and that with his, plaintiff's, consent, a deed for the Fulton county lands was made direct from defendant to plaintiff, and received and recorded by him; that plaintiff knew that Newkirk was indebted to defendant, and not entitled to a deed for the other land until the $800 note was paid; and that defendant was not interested in the purchase of the grocery from plaintiff, then they should find for defendant."

4. "The court instructs the jury that, if they believe from the evidence that plaintiff was informed, at the time he traded with Newkirk, that the title to the land in question was in Hewitt, and that Hewitt referred him to Mr. Fritchey, from whom he had acquired the land, for information as to character and value of the land, and that Hewitt was in no manner interested in the purchase of said property from plaintiff, then they should find for defendant."

5. "The court instructs the jury that, if they believe from the evidence that defendant did not conspire with one John V. Newkirk to cheat and defraud plaintiff, then they will find for the defendant."

6. "The jury are instructed that, if they believe from the

evidence that plaintiff received the title to the premises in controversy, and has sold and disposed of the same with the knowledge that his title would not be perfect to one of the tracts until he paid to Hewitt the balance of the note of Newkirk, and received the deed, which his attorney had drawn, from Hewitt to him, then they should find for defendant."

7. "The court instructs the jury that, if they believe from the evidence that in the transaction between Newkirk and plaintiff the defendant was no party, and was not interested in the trade, and that if any statements he made as to the quality or value of the land in question was mere loose talk, and that there was no confidential relationship between plaintiff and defendant, nor any prior acquaintance between them, then they should find for defendant."

A judgment will not be reversed for the refusal of instructions, if the instructions given present to the jury a correct and full statement of the law governing the case. The real question presented for our decision is as to the correctness and sufficiency of the instruction given; and if some of the instructions refused had been correct statements of the law applicable to the case, it would not necessarily follow that it was error to refuse them.

We do not think, however, that any one of the seven instructions refused could have been given without committing error.

A false statement, made with intent to deceive, accompanied by damage, is in all cases a good cause of action.

To entitle plaintiff to recover in this action it was necessary for him to show that defendant made some statement to him in regard to a material fact; that defendant knew the statement to be false, or, at least, did not know it to be true. As the statements in this case regarded the value and quality of land, they must appear to have been so extreme as to exclude possibility of honest mistake or difference of opinion; they must be shown to have been relied upon by

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plaintiff, and to have been the proximate cause of the transaction, and that transaction must have resulted in damage to plaintiff. If these facts were shown to the satisfaction of the jury, plaintiff was entitled to recover. The bill of exceptions shows that there was some evidence to each of these points. It is held that, to make a false representation ground for an action of deceit or fraud, it must have been made with intent to deceive (*Joliffe* v. *Collins*, 21 Mo.); but it is also held that when, as in this case, the false representation is as to the quality or title of land, it will be considered fraud, however innocently made. *Glasscock* v. *Minor*, 11 Mo.

On the other hand, had there been evidence to satisfy the jury that plaintiff did not rely upon the representations of defendant, or that they were as to facts within plaintiff's own knowledge, or that the false statements were mere expressions of opinion as to matters in regard to which defendant did not profess to have any superior means of forming a judgment, then the plaintiff would not be entitled to recover.

We think the instruction given for plaintiff put the law of the case fairly to the jury; and there is nothing here of which defendant can complain. Any inaccuracies in the instruction are favorable to defendant. It was not necessary, for instance, that the jury should find that Hewitt derived any benefit from his false representation, and the word "fraudulently" might have been safely omitted.

Appellant complains, however, that the word "fraudulently," in the instruction, is not explained. It was not necessary that the jury should find actual, moral fraud, and the word might have been omitted with safety, but its insertion does not prejudice defendant.

Fraud is so various that it escapes exact definition. As used in this instruction, the word needed no explanation.

All surprise, trick, cunning, dissembling, and unfairness, used to cheat another, is considered fraud. If by fraud is

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to be understood, as is said by some, intention to deceive, from expectation of advantage to the party himself or from ill-will to another, then plaintiff might have complained of the use of the word, if the instruction were not his own; but defendant is not damaged by a direction which requires the jury to find, as a condition precedent to recovery, a fact the existence or absence of which is not material to the case.

Appellant's counsel seem to be under the impression that, if plaintiff did not use diligence and avail himself of all the means reasonably in his power to ascertain the value, quality, and title of this land, he cannot recover in this action. This is not the law.

The negligence of plaintiff will not excuse the defendant, where the question is as to real estate, and the facts were peculiarly within the knowledge of defendant, and plaintiff relied on his statement. *Wannell* v. *Kern*, 57 Mo.

The measure of damages is correctly set forth in the instruction given. It is not what plaintiff made or lost by the exchange, but it is the difference between the value of the property sold, at the time of the sale, if the property had been as represented by defendant, and its value as it was in point of fact. *Langdon* v. *Green*, 49 Mo. On the evidence, we cannot clearly see that the verdict was excessive; but that was a question properly before the trial court, upon which it has passed, and into which we should not look unless in a case so glaring as to be beyond all possibility of doubt.

There is, however, one fact presented by the record to which we must advert; and that, not merely for the purpose of affixing a note of disapprobation to the practice, of whose disadvantage it is a flagrant instance, but because we are satisfied that, in this instance, it worked substantial wrong and injury; and it will be the ground of the reversal of this judgment and the remanding this cause for a new trial, though it is the only material error that we find upon the record.

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It appears, from affidavits filed in support of the motion for a new trial, that the jury were sent out of the court-room, with counsel, for the purpose of hearing the argument, and that the closing address of counsel to the jury was not made in the presence of the court. The consequence, in this instance, was that remarks fell from the lips of one of the counsel which would not have been permitted in the presence of the court.

We are satisfied that the immediate occasion of this unfortunate circumstance was the reprehensible practice of sending the case to be argued out of court. This is a custom which, in the interest of justice in this State, ought to be abandoned. It is as much the duty of a judge to preside over the argument of a cause to a jury as it is to listen to the evidence. His interference in either case may be needed at any moment, and great injustice may be, and is often, done and suffered by his absence at that critical time. If it be said that the case is not sent out to be argued without consent, we answer that consent is worthless, because it is extorted. Counsel are in a position that they cannot well refuse such a consent. To do so might prejudice, with the jury, the counsel refusing in this way to accelerate the dispatch of the business of the court. The desire to dispatch business and avoid unreasonable delay to suitors, witnesses, and jurors, and to save costs, is the laudable motive which induces the trial courts in this county to adopt this practice at the end of a protracted trial, when time is needed to do justice to the evidence in the argument of counsel at the close of a long, complicated, and warmly-contested case. But the administration of justice requires that all proceedings in the trial of a cause should be held in the presence and under the control of the proper presiding officer of the court. If the legal facilities for the dispatch of legal business are not what the rapidly increasing commerce and population of this county require, that is a matter for the Legislature.

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If time were really saved by this practice, it would have that point, at least, in its favor; but we question much if time is not rather lost.

The object of this proceeding is, we have said, to save time. In the pursuit of this object, after a cause has been under examination for several days, the counsel are sent into another room to discuss the evidence before the jury. Occasion is thus given for an irregularity which is calculated to defeat the whole purpose for which the trial was had. No preventive can be applied to such deviations from propriety. At best they may be corrected by the grant of a new trial, and thus this attempt to save time will serve to illustrate the homely maxim, "the more haste the less speed."

The case at bar is a signal illustration of the truth of these remarks. A case involving the protracted examination of many witnesses, patiently tried, without substantial error up to that point, must be sent back for retrial, at great cost of time and money, for errors which the court allowed itself no opportunity to obviate or correct, committed after every declaration of law in the case was made.

The action of counsel during the closing argument was strongly insisted upon as a ground for new trial in the court below, and is also urged here. The record shows affidavits, filed in support of the motion for a new trial, tending to show that counsel for plaintiff pursued a line of argument before the jury which no court would have tolerated for a moment, and that the jury were thus inflamed by statements in regard to witnesses, and to material facts in the case, that were wholly unwarranted by the evidence. It is true that counter-affidavits are filed, but enough appears uncontradicted, in regard to the course of argument to the jury which counsel for plaintiff permitted himself to pursue, to satisfy us that the substantial rights of defendant—rights in which he would have been protected had the argument been conducted in the presence of the court—were seriously

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invaded in the concluding argument. Against this, in the absence of the court, defendant had no redress. We cannot say how far the verdict of the jury may have been influenced by these illegal proceedings; and we think it was error in the court to request counsel to argue the cause to the jury out of the immediate presence of the court, or even to permit them to do so. It was error to overrule the motion for a new trial filed herein, based upon this action of the court, and the immediate consequence of this action, as shown by the affidavits which make part of the record. For these errors the judgment of the Circuit Court is reversed and the cause is remanded, to be tried anew in accordance with this opinion. The other judges concur.

The State of Missouri, Respondent, *v.* Virgil Creech, Appellant.

March 7, 1876.

A pardon for one offense is no ground for discharge from indictment for a separate and distinct offense, committed at another time, in another county.

Appeal from Warren Circuit Court.

Affirmed.

P. P. Stewart, for appellant.

William L. Morsey, for respondent.

Bakewell, J., delivered the opinion of the court.

The record in this cause shows that, at the April term, 1873, of the Circuit Court of Warren county, the appellant was indicted for the offense of grand larceny. At the October term, 1875, of the same court, he was tried on this indictment, and then moved to be discharged, showing a pardon issued to him by the governor of the State. This motion was overruled. Appellant was convicted, and his punishment assessed at three years in the penitentiary. A

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motion was then filed in arrest. The only ground alleged in support of this motion was this same pardon. The motion was overruled, and the prisoner duly sentenced. To the overruling of these two motions appellant duly excepted, and brings the case here by appeal.

The only action of the court below complained of here is the overruling of these two motions. The pardon of the governor is fully set out. It is dated October 25, 1875, and recites that the governor does release, discharge, and forever set free Browney Hinch, who was, at the October term, 1873, by a judgment of the Circuit Court of Randolph county, sentenced to imprisonment in the State penitentiary for the term of four years, for the crime of grand larceny. It is admitted that Browney Hinch and Virgil Creech are the same person.

Upon what theory counsel for appellant thinks it error for the trial court to refuse to discharge a man indicted for one offense, on production of a pardon for a quite separate and distinct offense, committed at another time, in another county, we are unable to guess. It was certainly no error. The pardon of one specific crime is not a free release from the penal consequences of all other felonies up to the date of the pardon. The judgment of the Circuit Court is affirmed. The other judges concur.

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THE STATE OF MISSOURI, to use of FREDERICK MEYROSE, Appellant, v. JOSEPH S. LAURIE *et al.*, Respondents.

March 7, 1876.

A conveyance made with the intent, in good faith, of paying one or more creditors, though its natural and necessary effect be to hinder and delay other creditors, is not, therefore, void in Missouri.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

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Fisher & Rowell, for appellant, cited: State *v.* Bennett, 37 Mo. 500; Sibley *v.* Hord, 3 Mo. 290; Cason *v.* Murray, 15 Mo. 378; Bump on Fr. Conv. 217, 221, and cases cited; State *v.* Lebaume, 19 Mo. 29; State *v.* Benoist, 37 Mo. 500; Bigelow *v.* Sturges, 40 Mo. 195; Thomas *et al.* *v.* Bobb, 45 Mo. 387.

Joseph S. Laurie, for respondents, cited: Reed *v.* Pelletier, 28 Mo. 177, 178; Bump on Fr. Conv. 70, 71, 232, 282, 283, 478; Murray *v.* Cason, 15 Mo. 379; Little *v.* Eddy, 14 Mo. 160.

Bakewell, J., delivered the opinion of the court.

Frederick Meyrose, to the use of whom plaintiff sues, claimed certain goods, valued at $843, which had been taken on execution as the property of one Blutevogel. The defendant gave the bond required by the statute, and the present suit is upon that bond. Respondents denied that Meyrose was the owner of the goods at the time of the levy and sale.

The evidence showed that Meyrose took a conveyance of the goods, knowing that Blutevogel was in embarrassed circumstances at the time. It appears that Blutevogel kept a small tailor-shop in St. Louis; that Meyrose was a journeyman in his employ; that Blutevogel owed Meyrose some money, and owed him, also, something for work. Meyrose and Blutevogel differ in their testimony as to how much was due for work and how much for money borrowed, but both agree that $600 was due altogether, and that this debt formed the consideration of two notes executed by Blutevogel to Meyrose, each for $300, one given in December, 1869, and the other in January, 1870. On April 15, 1870, Blutevogel sold out his establishment to Meyrose for $1,078, which is said to have been paid partly by the return of these two notes, partly by a note given by Meyrose for $300, partly by $75 paid by Meyrose to a creditor of Blutevogel, and the remainder in cash. The price paid was the invoice price of the goods, ascertained at the time by taking

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an inventory. The sign was at once changed, and Meyrose took full and exclusive possession of the store. On May —, 1870, defendants Crews and Laurie obtained judgment against Blutevogel, and immediately caused an execution to be issued, and levied on the stock which Meyrose had purchased, as he claims, from Blutevogel a few weeks before. There was some testimony tending to show that, at the time of the alleged transfer of the stock to Meyrose, he had knowledge of the particular indebtedness of Blutevogel for which the judgment under which the execution on which this levy was made was subsequently obtained. There is, also, evidence tending to disprove any such actual knowledge, on the part of Meyrose, of this particular debt.

The instructions given on each side are set out in the opinion below, as well as those asked by the plaintiff and refused. There was a verdict and judgment for defendants, and plaintiff, having duly saved every exception, his motion for a new trial being overruled, brings the case here by appeal.

The following instruction, asked by plaintiff, was refused:

"The court instructs the jury that, before they can find from the evidence that the sale from Blutevogel to Meyrose was made to hinder, delay, or defraud creditors, they must be satisfied from all the evidence in the case that such was the intention of said Blutevogel in making the sale, and that such was also the intention of said Meyrose in making the purchase; and, although they may find that such was the design of Blutevogel in making said sale, unless they further find that said Meyrose participated in, or was cognizant of, said fraudulent design, they cannot find that said sale was so made in fraud of creditors."

Certain instructions asked by defendant were also refused. These it is not necessary to comment upon or set out.

The law applicable to the case was declared by the court

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to be embodied in the following instructions, asked by the plaintiff and defendants, respectively.

Plaintiff's instructions:

1. "The jury are instructed that, if they find from the evidence that the goods taken from the possession of Meyrose were his property, and were not returned to him after filing his claim, or not tendered to him, and by him refused, they will find for the plaintiff the full value of the goods, notwithstanding some portion of said goods were not, in fact, sold under the execution by which the levy was made, but on other executions against Blutevogel."

2. "The court instructs the jury that the plaintiff was entitled to recover of the defendants for the value of the goods taken from his possession by the constable, and interest from the time of filing his claim herein, at the rate of 6 per cent., unless the jury shall be satisfied from all the evidence in the case that the sale from Blutevogel to Meyrose was fraudulent, or made to hinder, delay, or defraud creditors of said Blutevogel; and the sale aforesaid will be deemed *bona fide* and honest unless it is proven to be fraudulent, and the burden of so proving it is upon the defendant."

3. "The court instructs the jury that the change of possession required by law to make a sale valid does not require that the goods shall be actually removed from one place to another, but it will be a sufficient compliance with the law if there be some unmistakable sign of such change of possession, such as taking an invoice, or putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change of possession had taken place."

4. "Although the jury may find that Blutevogel may have intended to hinder, delay, or defraud his creditors by the sale of the goods in question to Meyrose, it does not affect the rights of said Meyrose under said sale, unless they find

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further that said Meyrose—knowing such intention on the part of Blutevogel—meant by such purchase to aid and assist said Blutevogel in so defrauding his creditors, and not merely to honestly secure his own debt."

5. "The court instructs the jury that, if they believe from the evidence that Blutevogel made the sale of the stock of goods in controversy to Meyrose with the *bona fide* intention of preferring one or more of his creditors to the exclusion of the others, he had, under the law, [a right] to make such preference, and said Meyrose had a legal right to accept such preference, and such a transfer is not fraudulent, or made to hinder, delay, or defraud creditors, although it may have included all of said Blutevogel's property, and although all the other creditors of said Blutevogel may have been left unpaid by reason of said transfer, and although said Blutevogel may have been insolvent at the time of said transfer."

Instructions given at the instance of defendants:

1. "The jury are instructed that, if they believe from the evidence that Blutevogel conveyed the goods in question to Meyrose with intent to hinder, delay, or defraud his creditors, and that Meyrose participated in such intent, then plaintiff cannot recover, even though he may have paid full value for said goods."

2. "The jury are instructed that, intent being an operation of the mind, its nature and character cannot be directly and positively proved as a tangible fact, but can only be determined from the acts of the parties, taking into consideration all the facts and circumstances of the case. The law presumes that every man intends the natural and legitimate consequences of his own acts; therefore, if a party in failing circumstances makes a sale or transfer of his property, the natural consequence of which is to hinder, delay, or defraud his creditors, the law presumes and declares that his intent in doing so was fraudulent as to creditors."

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The jurors are the proper judges of the evidence, and, though we may think that the verdict in this case was against the weight of the evidence as set forth in the bill of exceptions, we would by no means interfere with it did we not think that it was induced by the giving of the second instruction marked for defendants, the propriety of which cannot be maintained. There is a sense in which that instruction is true, but that sense is contrary to its obvious import, and instructions should not be so given as to leave the jury to conjecture their meaning. Neither is it enough that it was, in effect, corrected by the other instructions (particularly the fifth instruction) given for the plaintiff. This was early ruled by the Supreme Court, and in a case somewhat similar to the one at bar, where a like error had been committed by the trial court. *Jones* v. *Talbot*, 4 Mo. 279. Nor does it save the instruction that it uses the very words of the statute, especially where the use of these words, without explanation, has, as in this case, a tendency to mislead. The plain, obvious meaning of the instruction upon which this comment is made was a direction to find for defendant, if Blutevogel made a conveyance for the purpose of paying, in good faith, two creditors in full, leaving other debts unprovided for, and leaving no assets to meet them. The "natural" consequence of an act is the consequence which follows from the nature of the act itself. If, then, the conveyance made by Blutevogel by its nature delayed creditors, we are told in this instruction that it was fraudulent and void. Confessedly the conveyance was a preference made by an insolvent; it, therefore, necessarily delayed the creditors not paid, or not preferred; but it was not, therefore, void, because our law permits a preference, though the United States bankrupt law does not. That law, however, had of course no bearing on this case.

Every conveyance made with intent to "hinder, delay, or defraud creditors" is void as against creditors, by statute, in this State; but preference of a creditor by an insol-

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vent clearly, necessarily delays and hinders other creditors, and must, therefore, have been made with that intent. There is, then, a sense in which it is true to say that a conveyance made with intent to hinder or delay creditors is *not* void under our law. If A purchase of B, for a valuable consideration, to secure himself, the purchase will not be bad merely because A knew at the time that B was greatly indebted and in insolvent circumstances. A conveyance of property may, therefore, have the effect of hindering and delaying creditors, in a certain sense—that is, of hindering and delaying some creditors of the insolvent—but, if made in good faith, it will not necessarily be void on that account. *Gates* v. *Labeaume*, 19 Mo. 17. A conveyance made with the intent of hindering and delaying the creditors (in the sense of *all* the creditors) of the insolvent, and which had that tendency in fact, would be bad; but a conveyance made with the intent of paying some creditors, or one creditor, though it might necessarily hinder and delay other creditors, and must, therefore, have been made with that intent also, and was, therefore, actually made to hinder and delay creditors—that is, some creditors of the insolvent—would not be bad on that account. Take the case that A owes $10,000 to ten creditors, $1,000 to each, and has but $1,000 worth of property to distribute; he may pay B in full, by conveying to him all his assets, though this will necessarily hinder the nine other creditors, and, this being the natural and necessary consequence of the act, such an actual intention is proved by the conveyance itself. But if the conveyance to B is made in good faith, to pay an existing debt, it is good enough, and no violation of the statute as to fraudulent conveyances. On the other hand, a conveyance made to hinder all creditors is bad and fraudulent in law, however honest the intention, and even though the intention be, by the delay itself, more fully to discharge the debts; and a deed that tends thus to hinder and delay creditors, made by one in embarrassed circumstances, how-

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ever good his motive, will be bad, even though the person making it be not insolvent at the time, if he be afterwards unable to meet his debts due at the time of making the conveyance. *Potter* v. *McDowell*, 31 Mo. 62; *State, use, etc.*, v. *Benoist*, 37 Mo. 500; *Bigelow* v. *Stringer*, 40 Mo. 195.

There is no error in refusing the instruction asked by plaintiff and refused, as it is substantially given in instruction number four, given at plaintiff's instance; but, for the error in giving the instruction for defendants, marked number two, the judgment must be reversed and the cause remanded. The other judges concur.

Caleb T. Worley, Respondent, *v.* William H. Heath *et al.*, Appellants.

March 7, 1876.

When, under the provisions of the 1st section of the act of March 3, 1855, concerning the duties of sheriffs, marshals, and constables in St. Louis county, a bond has been given for the security of the person whose property is taken on execution, and such person improperly and unsuccessfully sues the officer for the trespass, such adjudication is no bar to proceedings against the sureties in the bond, under the 4th section of the act.

Appeal from St. Louis Circuit Court.

Affirmed.

Farish & Griffin and *A. W. Mead*, for appellant.

L. M. Shreve, for respondent.

Gantt, P. J., delivered the opinion of the court.

Worley sued O'Connell in replevin to the June term, 1872, of the St. Louis Circuit Court, to recover possession of a span of horses, wagon, and harness, valued at $750, and $150 damages for their detention. Defendant answered that he was a constable, and rightfully entitled to the possession of the property described, having seized it by virtue of two executions against one Hance; that plaintiff in this

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action claimed the property as his, whereupon Heath, Mudd & Schoenthaler gave bond, as required by law (Session Acts, 1855, p. 464), indemnifying defendant, which bond was returned with the execution; and prayed judgment. Plaintiff denied that such bond had been given and returned. There was a trial by the court, on March 6, 1873, and judgment for defendant for return of the property, or $168, at his option. On the same day the plaintiff appears to have given notice to Heath, Mudd & Schoenthaler that, on April 1, 1873, he would move for judgment against them on a bond by them executed, and approved by constable P. O'Connell, April 24, 1872, for all damages sustained by plaintiff by reason of the levy of certain executions on the span of horses, wagon, and harness. This motion was heard on October 20, 1873, and thereupon the court gave judgment against Heath, Mudd & Schoenthaler for the penalty of the bond, to be released on payment of $120, actual damages. A bill of exceptions was tendered by Heath, Mudd & Schoenthaler, and signed by the court, by which it appears that, "at the hearing of the motion, plaintiff offered, and the court admitted, against the objection of appellants, a bond." What the tenor of this bond was we are not told. The record does not contain it, though it professes to do so. The appellants excepted to its admission. The plaintiff then gave evidence, apparently without objection, of the damage occasioned to him by the levy, and then read in evidence the claim on which the bond was given. This claim, also, is represented in the bill of exceptions by a blank space. Appellants excepted to the admission of this last piece of evidence. The defendants (we understand this to mean the obligors in the bond) put in evidence the record of the case of *Worley* v. *O'Connell*, and rested. The court having given judgment against the obligors, they filed a motion for a new trial, alleging the finding and judgment to be against law, against the evidence, to be excessive, and because the whole matter is *res*

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adjudicata. The court overruled the motion; obligors excepted; and the judgment, being affirmed by the general term, is brought here for review by appeal.

In consequence of the imperfection of the bill of exceptions (which almost justifies the suspicion that counsel sometimes prepare their arguments without examining the record), we can only see that this was a case in which the person making a claim for personal property levied on under execution, instead of resorting to the bond which the constable holding the execution had taken and returned, saw fit to sue the constable in replevin, and was defeated, according to the provisions of the special act, already quoted, applicable to St. Louis county. Session Acts, 1855, p. 464. Thereupon he immediately moved for judgment against the obligors in that bond, under the provisions of section 4 of the act referred to, and the Circuit Court gave judgment accordingly against them.

The proceedings against O'Connell were entirely distinct from those against the obligors. It was a matter of course that plaintiff should fail in the first, his remedy being misconceived. He appears to have succeeded in the second, and we can find no error in the action of the Circuit Court. Certainly the matter was not *res adjudicata.* We cannot tell what the production before us of the bond and claim referred to, but not shown by the bill of exceptions, would have demonstrated. We can hardly see any room for thinking that they would have materially changed the aspect of the case.

The point on which the appellants dwell with much urgency is that the *same* matter which was before the court on October 20th had been already determined by that tribunal on March 6th previous, which we think is an untenable position. The judgment of the Circuit Court is affirmed. Judge LEWIS concurs; Judge BAKEWELL, having been of counsel, takes no part in this decision.

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ROBERT A. MAY, to use of HENRY C. LACKLAND *et al.*, Respondent, *v.* JOHN A. KELLAR *et al.*, Appellants.

March 7, 1876.

1. A judgment in a proceeding for unlawful detainer may be assigned.

2. M. obtained judgment against K., which judgment he assigned to L.; the assignee sued the sureties on the appeal bond; one of the sureties offered to offset, in this suit, a judgment against the assignor of the bond sued on, owned by him. *Held*, that the suit on the appeal bond was for unliquidated damages, and a set-off was not admissible.

3. On motion for rehearing, this court will not notice an informality in the judgment which does not affect the substantial rights of the parties.

APPEAL from St. Charles Circuit Court.

Affirmed.

John A. Kellar, with *Taylor & Whitney*, for appellants, cited: 2 Pars. on Con. 515; Broom's Leg. Max. 626; City of St. Louis *v.* Laughlin, 49 Mo. 559; Mortland *v.* Hill *et al.*, 44 Mo. 58; Covenant Mutual Life Ins. Co. *v.* Clover, 36 Mo. 392; Love *v.* Fairfield, 13 Mo. 300.

Lackland & Broadhead, for respondent, cited: Wag. Stat. 794, secs. 34–38, p. 1273, sec. 1, p. 1275, secs. 10, 11; Burgess *v.* Cave, 52 Mo. 43; State, to use, *v.* Modrell *et al.*, 15 Mo. 421; McPherson *v.* Meek, 30 Mo. 345; Johnson *v.* Jones, 16 Mo. 494; Mahan *v.* Ross, 18 Mo. 121; Pratt *v.* Menkins, 18 Mo. 158; Brake *v.* Corning, 19 Mo. 125; Basye *v.* Ambrose, 28 Mo. 39; Hammer *v.* Bridenbach, 31 Mo. 49; Long *v.* Towl, 42 Mo. 545; Morse *v.* Rathburn, 42 Mo, 595; Hammacher, Admr., *v.* Schroers, 49 Mo. 406.

BAKEWELL, J., delivered the opinion of the court.

This is a suit on an appeal bond executed by defendant Luckett, as principal, and the other defendants, as sureties, conditioned according to the terms of the statute, on appeal taken to the Supreme Court from the judgment of the Circuit Court of St. Charles county, in the case of *May* v. *Luckett*. The pleadings, evidence, and admissions in the case show the following state of facts:

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Robert A. May obtained judgment against Robert F. Luckett, in a proceeding of unlawful detainer. The judgment was for restitution of possession, damages $270, and monthly rents and profits $10, from April 3, 1872, the date of the judgment, until restitution made, and for costs. On the day judgment was rendered it was assigned by May to Lackland & Broadhead, his attorneys—first, to secure their fees, and then to secure advances made by Lackland & Broadhead to May. Appeal was taken by Luckett, and the proper bond given, with the usual condition. This suit is on that bond. On appeal, the judgment of the Circuit Court was affirmed. Execution was issued on February 3, 1874, in the name of May, to the use of Lackland & Broadhead. One Allen was, on February 19, 1874, by direction of Lackland & Broadhead, put into possession of the premises, under said execution, which was then returned unsatisfied as to damages, etc., Luckett being insolvent. On March 19, 1872, William J. McElhiney assigned to Robert F. Luckett a judgment which he had previously obtained in the Circuit Court of St. Charles county, against May, for the sum of $1,338.35. Of this assignment Lackland & Broadhead knew nothing when May assigned to them. This judgment of McElhiney against May, assigned to Luckett, is set up in defendants' answer as matter of defense. Plaintiffs claim that their demand, being for unliquidated damages, is not subject to set-off, and the record of this judgment and assignment was, when offered by defendant, excluded by the court at the objection of plaintiffs. There was a verdict and judgment for plaintiffs for $643.32. Motions for a new trial and in arrest of judgment were made and overruled, and, all exceptions being saved, the case is brought here by appeal.

It is claimed by appellants (and the points are all saved by the refusal of instructions asked by defendant, and by objections to evidence overruled on the trial, and are the only points insisted upon here):

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1. That the judgment of *May* v. *Luckett* was not assignable under our statute.

2. That the bond sued on is another and different bond from that assigned.

3. That the court below erred in refusing to allow defendants to read in evidence the judgment against May, owned by Luckett.

1. The statute provides (Wag. Stat. 794, sec. 34) that judgments for the recovery of money may be assigned in writing, which assignment shall be attached to the judgment and attested by the clerk.

The judgment in question was not assigned as required by the statute; but the assignment was good as an equitable assignment (if the judgment could be assigned at all), for the statutory mode of assigning judgments is cumulative, and does not prevent a party from making an equitable assignment in any other lawful way. *Burgess* v. *Cave*, 52 Mo. 43.

But could this judgment be assigned at all? It is said that, "judgments for the recovery of money" being named in the statute, by a familiar rule, the expression of the one thing is the exclusion of another; and that a judgment is an entirety, and cannot be assigned in part.

A judgment is, undoubtedly, an entirety; a judgment against A and B cannot be set aside as to A and maintained as to B. It either stands or falls as to both, and, in this sense, cannot be divided. But it by no means follows that part of a judgment cannot, in the nature of things, be assigned. It is true that part of a judgment cannot, in this State, be assigned without the consent of the debtor. *Love* v. *Fairfield*, 13 Mo. 300. This is for the protection of the debtor—against whom, otherwise, a hundred executions might issue for $1 each, with costs—and to prevent litigation, and from motives of public policy. But *semble* that, with the consent of the debtor, a part of a judgment might be assigned. But in this case the question does not properly arise, because the whole of the judgment was assigned, and

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the representative of the assignees was, under the execution, put into possession of the ground. Part of a judgment cannot be assigned to one man, and part to another, without consent of the debtor, for the reasons given above; but those reasons do not furnish grounds for saying that a judgment for possession and for money may not be assigned to one assignee. The judgment is a judgment for the recovery of money. That may be assigned; the statute expressly so declares. But it cannot be assigned without also assigning the judgment for possession, which is part of the same decree, because two men cannot (at least, they cannot without consent of the debtor) own each one-half of a judgment entitling them to two separate executions; therefore, the judgment of possession can also be assigned. We are, therefore, of opinion that this judgment was assignable, and that it was sufficiently assigned, and the Circuit Court ruled correctly in admitting it to be read in evidence in this case.

2. It is said by appellants that the bond sued on is not the bond assigned. The assignment is as follows:

"For value received, I hereby transfer, assign, and make over to H. C. Lackland and Wm. F. Broadhead, composing the firm of Lackland & Broadhead, a certain judgment in my favor, obtained in the St. Charles Circuit Court, against Robert F. Luckett, defendant in the above named cause, at the March term, 1872, on the — day of ——, 1872, and also all my interest in and to a certain bond filed in said cause, signed by R. F. Luckett and Wm. J. McElhiney.

"Witness my hand and seal.

"R. A. May, [L. S.]"

"Attest: J. Maher, *Clerk*."

This was entitled, "Robert A. May, plaintiff, *v.* Robert F. Luckett, defendant. Unlawful detainer. In the St. Charles Circuit Court. March term, 1872." It is true that this bond is not stated, in the assignment, to have been executed by Kellar; but the bond is sufficiently described. There is no merit in this objection.

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3. The court committed no error in refusing to allow the judgment against May, owned by Luckett, to be read in evidence. The suit here was upon a bond, and the damages were not liquidated. There must be a debt on the part of the plaintiff, as well as on the part of defendant, to authorize a set-off. The test is that the indebtedness for which the action is brought must be such that, if the plaintiff were sued by defendant on the set-off claimed, he could plead his cause of action in that suit as a set-off. A set-off is not admissible where the claim, on either side, is for unliquidated damages. *Brake* v. *Corning*, 19 Mo. 125. In an action against principal and sureties on an executor's bond, where various acts of misconduct were alleged as breaches, it was held that the damages to be recovered were not necessarily liquidated, and that the action was, therefore, not one in which set-off was allowed. *State, to use of, etc.* v. *Modrel*, 15 Mo. 421.

We see no error in the record for which this judgment ought to be reversed. The judgment of the Circuit Court of St. Charles county is, therefore, affirmed. Judge GANTT concurs; Judge LEWIS, having been of counsel, did not sit.

BAKEWELL, J., delivered the opinion of the court on motion for rehearing.

This case was ably, and, as we thought, exhaustively, argued; but counsel for appellants have filed a motion for a rehearing, and, to maintain their motion, file a written argument, in which some points are made to which the attention of this court was not heretofore called.

1. Though the judgment was assigned by May to Lackland & Broadhead before the appeal bond was given, we are of opinion that the bond was properly executed to May, as the adverse party in the suit, within the meaning of the statute. This bond was not in existence when the judgment was assigned; the bond mentioned in the written assignment is the bond given on appeal from the justice. This

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suit is upon the bond given on appeal to the Supreme Court. When the judgment was assigned to Lackland & Broadhead, there passed to them all remedies provided by law for the enforcement of that judgment, including recourse upon the appeal bond. The judgment being affirmed, the assignees of the judgment properly brought suit, in the name of the obligees of the appeal bond, to their own use.

2. We adhere to the view expressed in the opinion filed, as to the question of set-off.

3. Our attention is now, for the first time, called to the fact that judgment below was entered for a sum less than the penalty of the bond. This is an informality which could in no degree prejudice defendants, and, the judgment being for the right party, we shall not now grant a rehearing on this ground alone.

The application for a rehearing is denied. Judge GANTT concurs; Judge LEWIS did not sit.

THE STATE OF MISSOURI, to use of J. B. R. LESPINASSE, Respondent, *v.* ROBERT MITCHELL, *et al.*, Appellants.

March 7, 1876.

A purchased a lot of liquors at New York, and ordered them to be sent to B, at St. Louis, as his bailee. Before they reached St. Louis, he became distrustful of B, and, going to the express office, countermanded the direction to deliver them to B, but by mistake they were sent to B, notwithstanding. C, having a judgment against B, caused them to be seized on execution. A claimed the goods, but C disregarded his claim, gave bond, and held the property. B became bankrupt and the goods were taken by his assignee. *Held*, 1. That C was liable to A for the value of the goods taken. 2. That the circumstance of B becoming bankrupt had nothing to do with the relations between A and C.

APPEAL from St. Louis Circuit Court.

Affirmed.

D. T. Jewett, for appellants, cited: Cabanné *v.* Walker,

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31 Mo. 286; Holliday *v.* Jones, 59 Mo. 482; —— *v.* Pacific R. R. Co., 45 Mo. 237; Miller *v.* O'Brien, 9 Bank. Reg. 26.

M. Kinealy and *D. Dillon*, for respondent, cited: Bradley *v.* Holloway, 28 Mo. 150; St. Louis & C. R. R. Co. *v.* Castello, 30 Mo. 124; Hathaway *v.* Brown, 18 Minn. 414; Story on Sales, secs. 232–239; Baker *v.* Block, 30 Mo. 225: Beck *v.* Pollard, 55 Mo. 26.

GANTT, P. J., delivered the opinion of the court.

In this case, Lespinasse, in 1867, purchased a lot of liquors in New York, and, having no room for their reception and custody, ordered them to be sent to Lefort, at St. Louis. Before they reached St. Louis, he went to the office of the transfer company and ordered them to be delivered to him; not sent to the store of Lefort. By some mistake of the agent the goods were sent to the store of Lefort, and receipted for by one Franklin; and they were immediately seized by the sheriff (who had an execution in favor of appellants) as the goods of Lefort. The invoice and bill of lading were made to Lespinasse. The sale was effected to him, and Lefort appears to have had no connection with the goods at all, except that, for the convenience of Lespinasse, it had been originally intended to store the goods temporarily with him. Lespinasse claimed the goods in the hands of the sheriff, whereupon defendants (now appellants) executed the bond sued in this action. The case was tried before Judge Lindley, without a jury, at the December term, 1873, of the St. Louis Circuit Court. Besides the aforegoing facts, it appeared that the goods were marked with Lefort's name when seized; and that, proceedings in bankruptcy being, in August, 1867, commenced against Lefort, his assignee in bankruptcy took possession of the goods which the sheriff had seized; and the estate of Lefort would, in all likelihood, pay about 10 cents on the dollar to his creditors.

The court declared the law to be that—

1. "If the court, sitting as a jury, believe from the evi-

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dence that Lespinasse was the sole owner of the goods in controversy, at the time they were levied on in the attachment suit mentioned in plaintiff's petition herein, and at the time said Lespinasse claimed said goods as alleged in said petition, then the court will find in favor of plaintiff."

2. "If the court, sitting as a jury, find in favor of plaintiff, he will assess the damages in a sum equal to the value of the goods in St. Louis at the time they were levied on, and interest on the same, at the rate of 6 per cent. per annum, since the commencement of this action."

Defendant excepted, and asked the court to declare the law to be as follows:

"The court is requested to declare the law to be that, if the original defendant, Lefort, was adjudged and decreed a bankrupt, on petition of his creditors, in less than four months after the attachment of the property in controversy in the suit of *Mitchell* v. *Lefort*, and that proper and regular proceedings were had, in due time, to vest the title of said Lefort's property in the assignee, and that the proceeds of the sale of the property attached were, upon due proceedings, paid over by the sheriff of St. Louis county to the United States marshal, under orders of the United States District Court, then the attachment was, by operation of law, dissolved, and the question as to the ownership of the property transferred to the United States District Court, and this action cannot be maintained."

"The court is requested to declare the law to be that, if it is believed from the evidence in the case that the plaintiff, Lespinasse, had agreed with the original defendant, Lefort, to sell to him, Lefort, the liquors in controversy, when the same should arrive from New York, and that, in pursuance of such agreement, the said liquors were marked to Lefort, in New York, and shipped to him, and by the transportation company delivered at Lefort's place of business, as marked, before the attachment, then the said liquors had become the property of Lefort before the attachment, and this action cannot be maintained."

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The court refused these instructions, and defendant excepted.

1. The instructions given at the instance of the plaintiff were unexceptionable, and the appellant does not seek to controvert them in this court.

2. The second instruction asked by defendant was, we think, properly refused. There was no evidence whatever of any agreement on the part of Lespinasse to sell these goods to Lefort. All that is alleged or suggested by appellants, on this subject, is suspicion, wholly unsupported by proof. There is no inherent absurdity in the idea that such a sale was contemplated—that is, it would not be inconsistent with anything which appeared in this cause up to the time when Lespinasse went to the transfer company's office and ordered the goods to be delivered to him; not to Lefort. But there is absolutely *nothing* tending to show that such an agreement existed; and for this reason the instruction should have been refused, even if otherwise unobjectionable.

3. The third point—that the misfortune of Mitchell and others, in having the goods which they had seized upon and appropriated for the satisfaction of their claim against Lefort diverted to the general benefit of his creditors by the action of the United States District Court, operated to discharge Mitchell and others, and to substitute for them, as parties liable to the real owner of these goods, the assignee in bankruptcy—can hardly be seriously urged. Mitchell & Co. were guilty of a conversion of these goods, if they belonged to Lespinasse. If they belonged to Lefort, they were guilty of no conversion, but acquired a lien on the goods, which was divested by the proceedings in bankruptcy. In either case they would lose by those proceedings. If the goods belonged to Lefort, the priority they had acquired by their diligence—from which they might have reaped full satisfaction for their claim against him—would be defeated, and they would only have their dividend of his estate, on an equal footing with his other creditors. If the goods did not belong to Lefort, and did belong to

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Lespinasse, they should have been delivered to the latter when he demanded them from the sheriff. That officer would have complied with this demand if the firm of Mitchell & Co. had not given the bond sued on in this case. That bond made the goods irrepleviable by Lespinasse, and was an absolute conversion of them, if they really had belonged to him. Lespinasse could not, we think, have claimed the property in the hands of the assignee after this bond was given; but, at any rate, he was in no sense bound to claim it, and it nowhere appears that he was a creditor of Lefort. Certainly he did not become such creditor through the appropriation of his (Lespinasse's) goods by Mitchell & Co. These last can no more set up the loss of the goods to them by the bankruptcy proceedings, as a reason for their exoneration from the claim of the real owner, than they could, for the same object, show that after taking the goods away they stored them in a building which was consumed by fire.

There is no error in the record. The judgment is affirmed, all the judges concurring.

DWIGHT FOSTER, Respondent, *v.* ATLANTIC & PACIFIC RAILROAD COMPANY, Appellant.

March 7, 1876.

1. Where the exhibits were of great value, and, instead of being filed in the cause, were left in the custody of the clerk of the court, *held*, that the court properly overruled a motion to dismiss because they were not filed, they being placed within easy access of defendant.
2. Where the instrument sued on is for the payment of gold coin, the judgment should be for the amount found due, payable in gold coin; not for the market value of it, payable in paper currency.

APPEAL from St. Louis Circuit Court.

Affirmed.

Thomas J. Portis, for appellant, cited: 2 Wag. Stat. 1022, sec. 51; Rathwell *v.* Morgan, 37 Mo. 107; Dyer's Admr. *v.* Murdock, 38 Mo. 224; Campbell *v.* Wolf, 33 Mo.

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460; Can *v.* Waldron, 44 Mo. 395; Whrendorff *v.* Whitaker, 1 Mo. 206; Tate *et al.* *v.* Evans, 7 Mo. 420; Swearingin *v.* Knox, 10 Mo. 31; Pope *v.* Kisley, 23 Mo. 185; Lane *v.* Palmer, 28 Mo. 539; Shultze *v.* Baily, 40 Mo. 69; Kelley *v.* Fenee, 57 Mo. 490; Kline *v.* Keyes, 17 Mo. 326.

Hitchcock, Lubke & Player, for respondent, cited: Wag. Stat. 1036, sec. 19, p. 1034, secs. 3, 5, p. 1021, sec. 48; 1052, secs. 4, 5; Cushman *v.* Anderson, 26 Mo. 67; Robinson *v.* Lawson, 26 Mo. 69.

GANTT, P. J., delivered the opinion of the court.

Foster sued the Atlantic & Pacific Railroad Company, to the April term, 1874, of the Circuit Court, for the interest due on scrip certificates, alleged to be payable in gold. One of the scrip certificates was for $20,000, and the other for $6,500.

The defendant, being duly served with process, appeared, and, on April 7, 1874, moved to dismiss the suit because the scrip certificates had not been filed. The motion was considered by the court on April 11, 1874. It appeared that the papers, being valuable, had been lodged with the clerk of the court, but not filed in the cause, and plaintiff's counsel asked leave to file them then, which the court permitted, and overruled the motion to dismiss. The defendant excepted, and, on the fifth day thereafter, filed a motion asking the court to reconsider its action in overruling the motion to dismiss, but filed no affidavit or statement of reasons, and no pleading. The case was set for trial on May 2, 1874, and was then called. Defendant did not appear, but made default. The plaintiff offered in evidence to the court, sitting as a jury, the scrip certificates on which the interest was reserved; proved the value of gold as compared with paper, and took judgment for the paper value of the gold and interest. This was on May 2, 1874.

The defendant, on May 4, 1874, filed a motion to set aside this judgment for the following reasons:

1. The court erred in refusing to dismiss the suit.

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2. The court erred in refusing to reconsider its refusal.

3. That the court erred in trying the cause at the time it did.

4. Because the judgment should have been for defendant.

5. Because there was no evidence to sustain the finding, and the cause was not tried by a jury.

6. Because the damages are excessive.

7. Because the total judgment is grossly excessive.

8. Because the court committed error in allowing plaintiff to recover the difference between legal tender notes and gold coin.

9. Because the judgment exceeds the amount claimed in the petition.

10. Because the court erred in allowing the *within* [*written?*] instruments, upon which the suit was founded, to be filed at the time they were.

This motion was overruled, an appeal was taken to the general term, where the judgment was affirmed, and defendant, having saved all exceptions, appealed to the Supreme Court, whence the cause was transferred to this court.

1. The case was tried in strict conformity with the laws of Missouri and the rules of the court. There is no merit in any of the reasons assigned for setting aside the finding.

The defendant was in default, as may be seen by rules 19 and 21 of the rules of practice of the St. Louis Circuit Court, shown by the bill of exceptions. The case was regularly set for trial on May 2, 1874, and the defendant gives room for the suggestion, not so much that it was casually absent, as that it industriously absented itself from court on that day. When the Circuit Court most properly overruled the motion to dismiss the suit because the scrip certificates had not been filed, the filing of a motion to reconsider that refusal, instead of making a defense on the merits, had very much the appearance of trifling with the court, and must, at least, be taken as a confession that there was no meritorious defense.

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The appeal appears to have been taken for delay merely, and we should award 10 per cent. damages upon affirming the judgment of the Circuit Court if there were not, after all, an error in this record to which, however, the attention of the Circuit Court does not appear to have been drawn. For this reason we simply affirm the judgment. The error to which we allude is in the form of the judgment. A given sum of money was due from the defendant, payable in gold coin. Instead of ascertaining the value of this coin in United States notes, and giving judgment for the value so found, the court should have given judgment for the amount due, and ordered it to be *paid in coin*. *Bronson* v. *Rodes*, 7 Wall. 229 (255, *loco citato*). The respondent would gain by our modifying the judgment in this particular now, and making him pay the costs of this appeal. As the attention of the Circuit Court was not called to this matter, we make no such order, but simply declare the judgment of the Circuit Court to be affirmed. All the judges concur.

JOHN F. LUEBBERING *et al.*, Respondents, *v.* FRANCIS OBERKOETTER, Appellant.

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March 7, 1876.

1. On the trial of a case of trespass *de bonis asportatis*, it appeared that one of the plaintiffs had, since the commencement of the suit, sold and transferred his interest in the controversy to his co-plaintiffs. *Held*, that the other plaintiffs were properly permitted to continue the action in their name and to their use.
2. If the sheriff be a trespasser, the obligors in a bond given to indemnify him for making a levy on personal property will be liable as trespassers, at the suit of the owner of the property.
3. A bill of sale of personal property, drawn and executed on Monday, is not vitiated by reason of an account of stock having been taken of the property on Sunday.

APPEAL from St. Louis Circuit Court.
Affirmed.

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Noble & Orrick, for appellant, cited: Wag. Stat. 1034, sec. 2; State *v.* Ambs, 20 Mo. 214; Fowler *v.* Sculley, 72 Penn. 456; Lyon *v.* Strong, 6 Vt. 219; Finney *v.* Turner, 10 Mo. 205; Metc. on Con. 254, *et seq.*; Downing *v.* Ringer, 7 Mo. 585; 2 Kent's Com. 466.

Clover, Wingate & Kreiter, for respondents, cited: Fritch *v.* Heisler, *et al.*, 40 Mo. 556; Kaufman *v.* Hamm, 30 Mo. 388; Wetzell *v.* Waters, 18 Mo. 396; Camfax *v.* Chapman, 7 Mo. 175; Page *v.* Freeman, 19 Mo. 421; McNeely *v.* Hunton, 30 Mo. 332; Perrin *v.* Claflin, 11 Mo. 13; Allred *v.* Bray, 41 Mo. 484; McManus *v.* Lee, 43 Mo. 206; Belkin *v.* Hill *et al.*, 53 Mo. 492; Goff *v.* Mulholland, 33 Mo. 203; Miller *v.* Whitson, 40 Mo. 97; Smith *v.* Mathews, 6 Mo. 600; Boggs *v.* Lynch, 22 Mo. 563; Coldwell *v.* Dixon, 29 Mo. 227.

GANTT, P. J., delivered the opinion of the court.

This was an action in the nature of trespass *de bonis asportatis*, brought to the October term, 1873, of the St. Louis Circuit Court. The defendant denies every allegation of the petition. He was sued along with Rahmoeller, Mohr, Klinghammer, Overall, and Stonebraker; but Oberkoetter alone was served, and, as to those not served, the suit was dismissed. The case was called for trial April 9, 1874. A jury was sworn, and during the trial it appeared that, since the commencement of the action, one of the plaintiffs, Kurlfink, had sold to the other two plaintiffs all his interest in the property for which damages were claimed; whereupon the court permitted the plaintiffs to continue the action, in the name of John T. and Henry G. Luebbering, against the defendant. The jury found for the plaintiffs, and assessed the damages at $1,728.45. By the bill of exceptions filed by defendant, it appears that, when it was disclosed that Kurlfink had sold out to Luebbering and brother, defendant's counsel declared himself surprised, and asked that the suit be abated because the nature of the issue was changed, and the petition does not disclose the true

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nature of the issue to be tried. The court refused to declare the suit abated, and defendant excepted.

Plaintiffs asked leave to amend their petition by striking out Kurlfink's name, and the court allowed this, defendant excepting. John F. Luebbering testified that the purchase from Hensick was made on March 1, 2, and 3, 1873, for value, in good faith, and that possession was taken by them on March 2 and 3, 1873. March 2, 1873, was Sunday.

Herman Schuster, for plaintiff, testified to the good faith of the sale, the payment of value, and the delivery of the property to the purchasers.

The March term, 1873, of the St. Charles Circuit Court began on Monday, March 3d, and, on March 5th, judgments were obtained against Hensick *et al.*, on which executions issued, were placed in the hands of the sheriff, and levied on this stock of goods on March 6, 1873. On March 21, 22, 24, 25, 1873, this stock of goods was sold under these executions, some of which were against Oberkoetter as well as Hensick. On March 7, 1873, in order to induce the sheriff to make the sale, Oberkoetter and the other defendants originally sued, and as to whom the suit had been dismissed, executed a bond to Dierker, the sheriff, indemnifying him for making sale of the stock of goods seized as the property of Hensick.

The court gave the following instruction for the plaintiff:

"The jury are instructed that, whatever may have been the intention of the party, Hensick, in the sale and transfer of his personal property, as testified in evidence, yet the sale to the Messrs. Luebbering and Kurlfink cannot be avoided by reason of any unlawful intent on his part, unless they had knowledge of, and were privy to, such unlawful intent on the part of him, the said Hensick. If the jury believe, and find from the evidence, that, under the executions given in evidence against Henry Hensick, the sheriff of St. Charles county levied the same upon the property of the

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plaintiffs, and sold said property, and applied the proceeds of the same to the satisfaction of said judgment, and that the defendant, Francis Oberkoetter, entered into a bond of indemnity to said sheriff, indemnifying him in making such levy upon the said property, then he placed himself in the same position occupied by the sheriff; and if, in making such levy, the sheriff acted as a trespasser, the defendant, in signing said bond, made himself liable for the acts of the sheriff; and, if the jury believe that the property levied upon by the sheriff was the property mentioned in the petition, and was not, at the time of the taking of the same by him, the property of the said Henry Hensick, but the property of the plaintiffs, then the plaintiffs are entitled to recover, as against the defendant, the value of the property taken by the sheriff under said executions, together with interest from the commencement of the suit."

To the giving of this instruction defendant excepted.

The defendant asked, and the court gave at his instance, the following instructions:

"The jury are instructed, if they believe, from all the circumstances of this case, that plaintiffs were in collusion with Hensick in any effort to defeat and delay the payment of Hensick's debts, and that the alleged sale and transfer was made to effectuate this object, they will find for the defendant Oberkoetter."

"If the jury believe from the evidence that, after the alleged sale and transfer of the stock of goods to the plaintiffs, they remained in thepos session of said Hensick, and were in Hensick's possession at the date of the levy of the said executions, they will find for the defendant, Oberkoetter."

The defendant also asked the following instructions, which the court refused, but no exception was saved to the refusal:

"If the jury believe from the evidence that the transfer of the stock of goods by Hensick to Luebbering and others

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was fraudulently made by Hensick, for the purpose of hindering and delaying his creditors, they will find for the defendant."

"The jury are instructed, if they believe from the evidence that defendant, F. Oberkoetter, had *reason* to believe that the transfer of Henry Hensick's property to plaintiffs was fraudulent, and made in collusion with the plaintiffs in order to avoid the payment of his just debts, they will find for the defendant."

"If the jury believe from the evidence that the bill of sale from Hensick was executed and delivered to the plaintiffs on Sunday, March 2, 1873, and the consideration paid at said date, they are instructed that the plaintiffs cannot recover in this action."

"The jury are instructed that, unless they find from the evidence that the plaintiffs were in possession of the stock of goods in question at the commencement of this suit, the plaintiffs cannot recover in this action."

"The jury are instructed that, if they find from the evidence that the sheriff of St. Charles county, by virtue of an execution against Henry Hensick, levied the same upon the goods in question and took possession of the same, and that the defendant, Oberkoetter, had no other connection with said levy and seizure than to execute a bond as *security*, in which the Union Savings Bank, of St. Charles, was principal, to indemnify said sheriff, they will find for the defendant."

The jury found for the plaintiffs, and assessed their damages at $1,728.45, and judgment was rendered accordingly; and the defendant entered his motion for a new trial, and assigned his reasons substantially as follows:

1. The verdict was against the evidence and the weight of the evidence.

2. The court admitted illegal, irrelevant, and incompetent evidence on the part of the plaintiffs.

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3. That the court gave improper instructions for the plaintiffs.

4. That the court refused proper instructions offered by the defendant.

5. That the defendant was surprised by the ruling of the court, in permitting the plaintiffs to proceed further with the cause, and to amend their petition, when it appeared that Kurlfink, one of the plaintiffs, had no interest in the property at the date of the trial.

6. That the recovery is for the full value of the property, when two of the plaintiffs, J. F. and H. G. Luebbering, only claimed, and the evidence tended to show, and did show, that they had only one-half interest therein; that the sale of Kurlfink to the Luebberings of his interest in the goods did not carry with it any claim for unliquidated damages, arising from a trespass committed upon his possession previous to the transfer; such claim is not assignable.

The motion for a new trial was overruled. The defendant excepted, presented his bill of exceptions, which was allowed, and appealed to the Supreme Court, and the cause has been duly certified into this court.

There are thus three questions presented, namely:

1. Did the Circuit Court err in refusing to declare that the suit was abated by the sale to the remaining plaintiffs of the interest of Kurlfink?

2. Did the court err in giving the instruction asked for by plaintiffs?

3. Did the Circuit Court err in overruling the motion for a new trial?

1. As to the first point, we think there is no error. Under certain circumstances, not appearing here, a change of parties—for which our statute makes ample provisions (Wag. Stat., secs. 3, 4, p. 1034)—may work a surprise and entitle the other party to a continuance. But nothing of this kind was alleged, and no continuance was asked for,

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in this case, and no possible harm can have resulted to the defendant from the amendment.

2. The principal objection urged to the instruction given by the court for the plaintiff is that, by executing the bond, Oberkoetter became liable according to its tenor, and not liable in trespass by reason of having requested the sheriff, March 7, 1873, to go and sell property seized March 6, 1873.

We are of opinion that he was liable as trespasser. The Supreme Court of Missouri has repeatedly ruled the very matter now before us. In *Allred* v. *Bray*, 41 Mo. 487, the declaration of the court is very clear and emphatic. "There seems to be no principle of law better settled than that all persons who wrongfully contribute in any manner to the commission of a trespass, or, after the same has been committed for their benefit, assent to it, are responsible as principals, and each one is liable to the extent of the injury done," is the language of Judge Fagg. We need not refer to numerous other cases in our own and other States to the same effect. There is no room for doubting the proposition, either on reason or authority.

3. The motion for a new trial was founded in part on affidavits professing to show newly-discovered evidence. In his printed argument the learned counsel for defendant (now appellant) does not urge this reason for a reversal, and certainly these affidavits fail to come up to the requirements of such documents. They do not show diligence or materiality, and will not be further considered.

4. Although the defendant failed to save an exception to the refusal of his instruction as to the legal effect of the consummation on Sunday of the contract of sale under which plaintiffs claimed, he did save an exception to the introduction of the bill of sale in evidence, for the reason that it appeared to have been signed on Sunday; and the motion for a new trial assigned, as one of the reasons for it, the admission of improper evidence for the plaintiffs.

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We think that it sufficiently appears that the plaintiffs and Hensick were employed on Sunday, March 2, 1873, in taking an account of stock, making a schedule, and preparing the bill of sale, which was perhaps signed on that day. It was acknowledged and delivered on Monday, March 3, 1873.

In the case of *Fritsch* v. *Heislin*, 40 Mo. 555, the parties met on Sunday, at the house of the plaintiff, and concluded an agreement by which plaintiff was to lend Heislin a sum of money, for which Heislin then executed a note indorsed by his co-defendant, Stocke. The note was delivered on Wednesday following. The court treated the contract as being completed on Wednesday, and upheld the action on the note against the maker and indorser. This is a much stronger case than that presented by this record.

In *Kaufman* v. *Hamm*, 30 Mo. 387, the Supreme Court very unequivocally manifested its repugnance to such a defense as is here attempted.

We entirely concur with the views entertained and expressed on this subject by the Supreme Court of Missouri. Even if we thought otherwise, we would be no less bound by the decision of that tribunal.

We find no error in the record, and order the judgment to be affirmed, all the judges concurring.

M. R. Thurston, Respondent, *v.* Kansas Pacific Railway Company, Appellant.

March 7, 1876.

Upon a judgment rendered by a justice, and appeal to the Circuit Court, not taken on the day when judgment was given, it is essential that notice of the appeal be given before the second term thereafter. If appellant fail to do this, the judgment must be affirmed.

Appeal from St. Louis Circuit Court.

Affirmed.

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Davis & Smith, for appellant, cited: Thomas Purcell *v.* Hannibal & St. Jo. R. R. Co., 50 Mo. 504; Wag. Stat., sec. 21, p. 850; Bruner *v.* Marcum, 50 Mo. 403.

Slayback & Haeussler, for respondent, cited: Eleanor Noy & Co. *v.* Hannibal & St. Jo. R. R. Co., 51 Mo. 575; Blake *v.* Downey, 51 Mo. 439; Bowley *v.* Hurds, 50 Mo. 403; Purcell *v.* Hannibal & St. Jo. R. R. Co., 50 Mo. 504.

GANTT, P. J., delivered the opinion of the court.

Thurston commenced an action before Justice Jecko, in St. Louis county, against the appellant, to obtain judgment, on May 5, 1874. An appeal was taken on May 11, 1874, and the transcript was lodged with the clerk of the Circuit Court on May 25, 1874. This made the appeal returnable to the June term, 1874. No notice of appeal having been given, Thurston moved to affirm the judgment during the October term, 1874. The court overruled the motion, Thurston excepting, and, the cause being called for trial, the plaintiff "refused to plead;" whereupon, on motion of the defendant, the court dismissed the suit, and plaintiff appealed to the general term, which reversed the judgment of the special term, and the railway company appeals therefrom to this court.

By the bill of exceptions it appears that, on October 14, 1874, a notice of the appeal was posted in the office of Justice Jecko; that the original plaintiff did not reside in St. Louis county; that the defendant had, from the first, made diligent search for her without success, and did not find until October 14, 1874, that she resided in Kansas City.

The claim in this cause was for an alleged overcharge on freight from Junction City to St. Louis.

1. The first day of the June term, 1874, of the St. Louis Circuit Court was Monday. During all that term no notice was filed of the appeal. But this seems to be accounted for by the affidavits filed by the railway company.

2. The appellant was not liable to have its appeal dis-

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missed until it had failed to give the required notice before the second term following the appeal; but it seems to be expressly held that it was so liable then. *Nay* v. *Hannibal & St. Jo. R. R. Co.*, 51 Mo. 575–577. "Such failure to give the required notice before the second term is a failure to prosecute the appeal." It may be said, indeed, that the appellant did its best, and only failed because of the non-residence of the respondent to give notice of the appeal; to which the sufficient answer seems to be that, in case of the non-residence of the respondent, the appellant should have taken at some period before October 1, 1874, the step it really took on the 14th of that month. Had it done so, it would have been diligent, or, at any rate, not so negligent as to incur the penalty indicated in the decision of the Supreme Court. If the point had not been thus settled by our own Supreme Court, we should have been disposed to give a different construction to the statute. But we consider the question as no longer open, and, accordingly, order the judgment of the general term to be affirmed. All the judges concur.

BERNARD HENKS, Respondent, *v.* AUGUST DEBERTSHAUSER, Appellant.

March 7, 1876.

A justice of the peace in St. Charles county has not jurisdiction of a suit to recover a horse alleged to be worth $75, and $50 for the detention of it.

APPEAL from St. Charles Circuit Court.

Reversed.

Lackland & Broadhead, for appellant, cited: Wag. Stat. 817, secs. 1, 2, p. 809, sec. 3, p. 850, sec. 18; Webb *v.* Tweedie, 30 Mo. 488, 491; Clark *v.* Smith, 39 Mo. 498; Henderson *v.* Henderson, 55 Mo. 534; Hannibal

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& St. Jo. R. R. Co. *v.* Mahoney, 42 Mo. 467; Glasby *v.* Prewitt, 26 Mo. 121; Patrick *v.* Abeles, 27 Mo. 184; Stone *v.* Corbett, 20 Mo. 350, 354; Williams *v.* Bower, 26 Mo. 601; Spencer & Husband *v.* Vance, 57 Mo. 428; State *v.* Metzger, 26 Mo. 65; Hamberger *v.* Pacific R. R. Co., 43 Mo. 191; McCloon *v.* Beattie, 46 Mo. 391.

Charles Dandt, for respondent.

GANTT, P. J., delivered the opinion of the court.

Henks sued Debertshauser, before a justice of the peace, for the recovery of a horse alleged to be worth $75, and $50 for detention of it. There was judgment for Henks before the justice, and again on appeal in the Circuit Court, whence Debertshauser appealed to this court.

Appellant makes several points on which he relies for a reversal of the judgment, one of which goes to the jurisdiction of the justice.

This was an action for the recovery of specific personal property. The jurisdiction of a justice of the peace is declared (Wag. Stat., sec. 3, p. 808) to be concurrent with the Circuit Court in "all actions for the recovery of specific personal property, not exceeding the value of $100, alleged to be wrongfully detained, and damages for injuries thereto, or for the taking and detention, or detention thereof, not exceeding $25."

Inasmuch as jurisdiction is "the right to hear and determine a cause" (*United States* v. *Arredondo*, 6 Pet. 691–709, for the remark of Judge Baldwin), and, consequently, it is the claim as presented, not the claim as decided or allowed, which is the measure of the power of the court, it follows that the justice had no jurisdiction of the cause which is brought before us on appeal. This ruling renders all other examination of the record unnecessary. The judgment of the Circuit Court is reversed, all the judges concurring.

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In re Estate of Isaac Walker, Deceased, Respondent, *v.* Thomas A. Walker, Executor, Appellant.

March 7, 1876.

A person domiciled in Missouri may spend the greater part of a year, or series of years, at another place without thereby forfeiting his domicile. He does not forfeit his domicile without an intention, definitely formed, to abandon his original domicile and take up another; and until this intention appears, either directly or by some act inconsistent with the retention of the old domicile, the presumption of the continuance of it is not overcome.

Appeal from St. Louis Circuit Court.

Reversed and dismissed.

A. J. P. Gareschè, for appellants, cited: Wilson *v.* Terry, 9 Allen (Mass.), 215; Griffin *v.* Wall, 32 Ala. 160, 161; Church *v.* Rowell, 49 Me. 370; Attorney General *v.* Rowe, 1 H. & C. 41; Kellogg *v.* Oshkosh, 14 Wis. 623; Story Confl. (3d ed.) 54, sec. 44, p. 55, sec. 45, p. 56, sec. 45; Westlake's Int. Law, 37, secs. 36, 41, 42; 5 Madd. Ch. 246, sec. 405; Warren *v.* Thomaston, 43 Me. 418; Church *v.* Rowell, 49 Me. 370; Adams *v.* Abernathy, 3 Mo. 198; 37 Mo. 198; First National Bank *v.* Balcom *et al.*, 35 Conn. 351, 354; Board of Supervisors *v.* Davenport, 40 Ill. 208; Frost *v.* Brisbin, 19 Wend. 14; Douglass *v.* Mayor of New York, 2 Duer (N. Y.), 119; Hallet *et al.* *v.* Bassett, 100 Mass. 170; Gilman *v.* Gilman, 52 Me. 165; Greene *v.* Beckwith, 38 Mo. 387–389; Exchange Bank *v.* Cooper, 40 Mo. 171; Smith *v.* Rollins, 25 Mo. 410; Otis *v.* City of Boston, 12 Cush. (Mass.) 50; Johnson *v.* Smith, 43 Mo. 501; West Cambridge *v.* Charleston, 13 Mass. 503; Harvard College *v.* Gore, 5 Pick. (Mass.) 377; Wag. Stat. 1068, sec. 34; Wiggans *v.* Swett, 6 Metc. (Mass.) 197; Dearing *v.* Adams, 34 Me. 44; Lewis *v.* Bohlto, 6 Gray (Mass.), 138; 3 Metc. (Ky.) 74; Montgomery *v.* Sears, 2 Cal. 57; State *v.* Jones, 11 Iowa, 12; Beasley *v.* Prentiss, 13 Smed. & M. (Miss.) Ch. 99, 100; May *v.* Courte-

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nay, 47 Mo. 187; Asbury v. McIntosh, 20 Mo. 278; Hasselmeyer v. Zinc Co., 50 Mo. 181.

D. T. Jewett, for appellant, cited: Green v. Beckwith, 38 Mo. 384; Cadwalader v. Howell, 3 Harr. (N. J.) 138; Hackettstown Bank v. Mitchell, 4 Dutch. (N. J.) 516; Pearce v. State, 1 Sneed, 63.

Krum & Madill, for respondent, cited: Wag. Stat., Art. 1, sec. 81, p. 72; Green *et al.* v. Beck, 38 Mo. 384.

GANTT, P. J., delivered the opinion of the court.

At the December term, 1873, of the St. Louis Probate Court the letters testamentary of Thomas A. Walker, executor of Isaac Walker, were revoked, on the ground that he had become, since the grant of them in 1868, a non-resident of the State of Missouri. He appealed to the St. Louis Circuit Court, which, upon a hearing of the cause, declared him to be a non-resident of Missouri. This finding, and the judgment of revocation consequent on it, being affirmed by the general term, Walker appealed to the Supreme Court, and the cause is transferred to the St. Louis Court of Appeals.

The question was entirely as to the residence, in 1873, of Thomas A. Walker.

There was no dispute that at his father's death, in 1868, he resided in St. Louis. In 1871 he still, beyond cavil, resided here. In that year he married; and, for the alleged reason that his wife's health required it, she has always lived, since the marriage, at Council Bluffs, Iowa. Walker has large landed possessions here, and much business. He has *sojourned* since his marriage, principally, with his wife at Council Bluffs, where, however, he has boarded himself and family, not keeping house.

Many witnesses were examined in the Circuit Court. Warren, deputy county treasurer of Pottawattamie county, Iowa, testified that he knew Walker; that he had resided at Council Bluffs, Iowa, for the last six months (deposition taken May, 1873); that his family resided there, and that

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common report made him a resident of Iowa. Thomas Bowman testified that he was city assessor for Council Bluffs; that he knew Thomas A. Walker; that, as assessor, he called on Walker, who gave him his name and the number of persons in his family; he also gave in his real and personal property for taxation; that a county poll-tax was assessed on him; and that he was registered as a voter at Council Bluffs. This last was done by witness of his own motion, and not at Walker's request. It is witness' custom to register the names of all whom he considers entitled to vote. The property of Walker assessed was "one county poll and $500 in money and credits." Witness did not know that Walker was aware that he was assessed for a poll-tax.

A. Spier, examined in New York, October 28, 1873, testified that in 1871 Walker told him, in New York city, that he resided at Council Bluffs, and would not live in St. Louis; and that, in reply to a question from Mr. Shepley, he said that Council Bluffs was his residence. Witness' knowledge was drawn wholly from statements made to him by Walker and his wife.

William M. Gawtry, examined October 28, 1873, in New York, testified that he was brother-in-law of Thomas A. Walker, and had known him for twenty years and more. In 1868 witness was in St. Louis, and Walker told him that he intended to remove to Council Bluffs. In January, 1873, Walker said he was living in Council Bluffs; heard him then, in conversation with Mr. Shepley, say he resided at Council Bluffs, Iowa. Witness had written letters to him at Council Bluffs, and received answers dated from that place.

W. N. Nevins, of New York city, testified that he had been employed by Walker, in St. Louis, prior to October, 1871; had heard him say that he considered Council Bluffs, Iowa, his place of residence; that he had voted in Iowa, and could not vote in St. Louis. He was absent from St. Louis ten

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months in all between July, 1870, and October, 1871. On three or four different occasions he spent his absences at Council Bluffs, so he told witness. He told witness, in 1871, that he considered Council Bluffs his residence; that he had bought a house there, and his wife was living in it.

On cross-examination he said that, as far as witness' knowledge went, Walker's mode of life while in St. Louis, in 1871, was what it had formerly been. He retained his lodging-rooms, his office, and his boarding-place. First heard him say that he considered Council Bluffs his residence in the fall of 1870. He had owned property there since 1867. Inferred that he resided at Council Bluffs from his having a house there partly furnished, and his wife living in it.

John S. Dorkey testified that he had been in Walker's employment since 1868. He married in 1871. His wife never resided here. When in St. Louis he lives at his old place on St. Charles street. When he has been here since 1871 he has lived as he always did before. Since his marriage he has been back and forth from St. Louis to Council Bluffs. Recently he has spoken of the bad health of his wife. In 1871 and 1872 he was absent, at Council Bluffs, two or three months of each year. His clothing was kept in a wardrobe in his sleeping room on St. Charles street, St. Louis. There has been no difference in his way of living since his marriage from what it was before.

This was the evidence on the part of those asking for the removal of Walker.

On the part of Walker was examined Mrs. Williams, who testified that she was his mother-in-law; that his permanent place of residence was St. Louis; that he had been temporarily and occasionally at Council Bluffs since and before his marriage. Witness occupies a house belonging to Walker's wife, and boards him and his family while he is at Council Bluffs. On account of his wife's bad health witness urged her to remain at Council Bluffs, when she

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would talk of going to St. Louis to live. Witness said nothing on the subject to Walker himself. His wife's health has prevented her going there, so far. Heard Walker, in the spring of 1872, say that the unsettled business of his father's estate prevented his removal from St. Louis. Since his marriage he has been fully half his time in St. Louis.

On cross-examination she said that his wife had always lived at Council Bluffs since her marriage. Walker has divided his time between Council Bluffs and St. Louis. Witness boards him and his wife in a house rented by witness from Mrs. Walker. He has kept a horse and carriage at Council Bluffs for his wife and family.

E. S. Williams testified that he was the husband of the last witness; that he had known Walker since 1855; that Walker resided then at St. Louis, and still resides there. He has not changed his residence. Witness knows this from an agreement made with Walker in regard to the place occupied by witness. The agreement is that witness and his wife take charge of the place and board him (Walker) and his wife until the affairs of his father's estate are so far settled that he can make Council Bluffs his home. He has at least temporarily abandoned the idea of removing to Council Bluffs, and intends removing his wife to St. Louis as soon as her health will permit. He has never claimed Council Bluffs as his residence. He has spoken of it as a probable future place of residence. Witness has often conferred with him on this subject during the last half-dozen years. At witness' persuasion he bought the Test place. He intended laying it out, in connection with other property, into lots. Things are so dull here that this design is suspended. He has said that the settlement of his father's estate keeps him in St. Louis. He was asked: "Does he not now intend to move to Council Bluffs as soon as said estate is settled?" He answered: "I think it is extremely doubtful." He was asked if, before his marriage, he did

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not promise to remove to Council Bluffs, and replied that he gave no such promise to witness, or to any one, to witness' knowledge. Walker abandoned the idea of making Council Bluffs his home eighteen months or two years ago (this deposition was taken May 26, 1873), long before this controversy started. Walker's name is borne in the Council Bluffs directory. It was placed there without his consent.

W. C. James testified that he resided at Council Bluffs, Iowa, and was an attorney at law; that he had known Walker since 1856; that he resided in St. Louis; that witness, within four years, had had frequent conversations with Walker, touching a future change of residence from St. Louis to Council Bluffs. He has in all that time claimed St. Louis as his residence. He has said that if property advanced in St. Louis, and he could sell his property there, and if the prospects of Council Bluffs improved, he would come to Council Bluffs; but that property was dull of sale in St. Louis, and it was extremely doubtful if he could ever carry out this plan. This was in the summer and fall of 1872. Two years ago, he said he had abandoned the design of coming to Council Bluffs.

Isaac H. Walker, brother of Thomas A. Walker, examined in New York, October 28, 1873, testified that, from 1851 to the date of his examination, Thomas A. Walker has constantly resided in St. Louis. This witness spoke of the satisfactory manner in which Thomas A. Walker had managed the business of his father's estate, and of the wish of every one, except Gawtry, a brother-in-law, that he should continue in charge of it. Witness had been deceived by Gawtry into signing a paper asking for the removal of Thomas A. Walker on the score of non-residence. Afterwards he visited St. Louis and found Gawtry's statements untrue, whereupon he revoked all that he had said or written relating to Thomas A. Walker's removal.

Van Studdeford, for Thomas A. Walker, testified that he was a physician; knew Thomas A. Walker intimately. He

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resided in St. Louis as certainly now as before 1870. Witness resides here, and has known Walker for many years.

Joseph O'Neil resides in St. Louis; has known Walker from twenty to thirty years. He resides in St. Louis.

John Riggin and John J. Murdoch testified to the same effect.

R. W. Powell also testified in the same way.

It appears by the five last witnesses that Thomas A. Walker has always spent part of each year away from St. Louis; that he has large property in Iowa, and goes there often, but not more frequently, and makes no longer visits, since 1871 than before, but still keeps his residence here, his lodging-room, office, etc.

John R. Shepley testified that he was of counsel for the defendants in the case of *Cabanné* v. *Walker*. All the defendants except Thomas A. Walker were non-residents. There was talk of removing the case to the United States Circuit Court. The memory of witness is indistinct. Some one suggested that Thomas A. Walker was a non-resident. Don't recollect his answer. After this conference no attempt was made to remove the cause. He (Walker) lives now as he did before his marriage.

Thomas A. Walker testified that he did not tell either Gawtry or Spier that he had removed to Iowa, or was living there with his wife, or did not reside at St. Louis; nor did he say at Mr. Shepley's office that he was a resident of Iowa. Never told Nevins that he had voted in Iowa, and, in fact, never did vote there; never was registered there until Bowman did it without witness' knowledge; never paid a poll-tax there; never voted there; and has always, for the last twenty years, made St. Louis his home. Has not voted here because he was not registered. His name was placed in the Council Bluffs directory without his knowledge. He always voted in St. Louis until compelled to register. He keeps his wardrobe here, and, on going to Council Bluffs, takes such clothes as he needs. Purchased

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the house in which he lives at Council Bluffs before his marriage, and settled it on his wife since his marriage. It is leased to Dr. Williams on condition of his boarding witness. This lease was dated November 1, 1870. There has been no formal renewal of this lease, but the same arrangement has since continued, and exists at this day. Witness spends, on an average, one-third of his time at Council Bluffs. On cross-examination he said he had no charge of the house; did not employ the servants. His wife employs a nurse girl. Has a carriage and horses at Council Bluffs for the use of his wife and child. When at Council Bluffs he often has had washing done. Witness has never kept house here, nor has his wife ever lived here

The court gave the following declarations of law:

"Although the court may find from the evidence that Thomas A. Walker resided in the city and county of St. Louis, Missouri, at the time letters testamentary were granted to him, by the St. Louis Probate Court, upon Isaac Walker's estate, the said Thomas A. Walker being then an unmarried man, yet, if the court further finds from the evidence that said Thomas A. Walker, in the year 1870, purchased a dwelling-house in the city of Council Bluffs, Iowa; that he afterwards, in June, 1871, married his wife there, and, after his marriage, gave his dwelling-house to his wife; if his wife, from that time to the present, has, under an arrangement made by her husband with his father-in-law, boarded with her father and mother in said dwelling-house at Council Bluffs, Iowa; that, since his marriage, said Walker has passed a portion of his time with his wife, and furnished, at Council Bluffs, a horse and carriage for the use of his wife, and, whenever at Council Bluffs, boarded and lived with his wife in the same house and family, then the court should find that said Thomas A. Walker had become a non-resident of the State of Missouri since the grant to him of said letters testamentary."

To the giving of which Thomas A. Walker duly excepted.

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He then asked the following declarations of law, which the court refused, and he excepted thereto:

"The court instructs the jury that one may be said to have a domicile in that place which constitutes the principal seat of his residence, of his business pursuits, connections, attachments, and of his political and municipal relations. Domicile, in any place, is acquired by residence there of a person with the intent to regard and make that place his home. Domicile, in any place, is abandoned by a removal by a person from a place of residence with an intention not to return there and to make his home. Both in acquiring and abandoning a domicile, the act and intent must concur. A person always has a domicile at some place, and, therefore, a domicile once fixed continues and attaches to a person until another domicile is acquired and substituted therefor, although as to such domicile there has been a concurrence of the act and intent of abandonment. The acts and intents of persons, in the matter of their domicile, may be inferred from their declarations and conduct.

"If, at the time of letters granted Thomas A. Walker, the executor was a resident of this city, such residence, in the absence of proof to the contrary, is presumed to continue, and temporary absences, or temporary visits to any other State, however frequent or long continued, and whatever the motive, indicate no change of residence unless such absence and such visits were with the intention to change his place of residence, which intention must have the concurrence of an actual change as well as the intention of a change; and his acts, as well as his declarations at the time of the acts, are to be weighed by the jury in the conclusion they reach, whether there was or was not a change of domicile.

"The court instructs the jury that the domicile of a person is the place where he lives, regarding it at the time as his home, and such a domicile is only lost when the resident leaves it with an intent not to return and reside there again. That, to constitute a change of domicile, both the intent and

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the act must concur; an intention to remove without an actual removal is not sufficient."

When the case was called for trial in the Circuit Court, Walker demanded a jury, which the Court refused, he excepting to the refusal.

The requirement that administrators and executors should be residents of the State, and disqualifying for that office all who do not so reside, became law in Missouri in 1845. Rev. Code, 1845, Art. 1, sec. 58, p. 72. Prior to that time there was no disability on the part of a non-resident to administer, in Missouri, on the estates of persons domiciled and dying here.

There is a difference between a residence and a domicile, which, however, may not be capable of easy definition—that is to say, it may be difficult to define both terms in such manner as to escape criticism. But every one can see at least this distinction: A person domiciled here may, for the sake of his health, reside one or more years in some place the climate of which is supposed to be more favorable to his constitution. In such cases it would be harsh and unnatural to consider the person thus residing abroad to have forfeited his domicile here, or in any proper sense to have become a non-resident of Missouri, unless some intention, manifested by some act of abandoning his residence here, were shown. So long as a person previously domiciled and residing in Missouri does no act to indicate his intention to cease to be a resident of this State, and to remove elsewhere, much weight is due to the presumption that he continues to be a resident of Missouri, notwithstanding prolonged absences extending to the greater part of the year. If no such absences are shown, and no unequivocal act occur accompanied by a declaration of intention to change his residence, this presumption is not overcome.

In the case at bar, we are of opinion that the court properly refused to impanel a jury to determine whether Thomas A. Walker had or had not ceased to reside in Missouri.

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This opinion renders it necessary that we should consider the testimony adduced, and determine that question without regard to the declarations of law made by the Circuit Court. Our task is somewhat increased by this view of the matter. The instruction given by the Circuit Court we think erroneous. It makes residence or non-residence to depend on several equivocal matters of fact, without the concurrence of any intention on the part of Walker. It would make a man who, up to the year 1876, resided in St. Louis, by marrying a wife in Illinois in (*e. g.*) January of that year, and, instead of bringing her to St. Louis, his place of business, boarding her at the house of her parents or a stranger in Illinois, furnishing her with a horse and carriage, and becoming the purchaser of the property occupied by her in Illinois, a non-resident of Missouri in the course of a few months, notwithstanding that his business, his interests, the bulk of his property, and the exercise of all his political privileges, as well as his declared intentions, indicated Missouri as his home and residence, and Illinois as his temporary place of sojourn. If this be law, the decision of the Supreme Court of New Jersey (*Hackettstown Bank* v. *Mitchell*, 4 Dutch. 516) was palpably wrong. But our duty is, not to criticise the abstract views entertained of the law of domicile and residence by the Circuit Court, but to determine, on appeal from its decision, whether the evidence adduced justified it in the conclusion at which it arrived in the case of Thomas A. Walker.

We are of opinion that the evidence does not justify the conclusion reached by the Circuit Court. The affirmative was on those who were seeking the removal of the executor, and who showed cause for his removal, to wit, his having ceased to be a resident of Missouri. The evidence, in our judgment, greatly preponderates in favor of his not having so ceased. Excluding the testimony of Mr. and Mrs. Williams, and Mr. Walker himself, we think that the preponderance exists. When theirs is thrown into the

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scale, there is a removal of all doubt. There is much to support the testimony of Mr. Walker. One of the strongest points on the side of the petitioners for his removal is his supposed declaration to Mr. Shepley that he was a non-resident of Missouri. Both Mr. Spier and Mr. Gawtry swear to this. Mr. Shepley does not remember what Thomas A. Walker said, but does remember that some one else suggested that Walker resided in Iowa, while Walker expressly and pointedly declares that he said no such thing. Thus far there is a preponderance against Thomas A. Walker. But we are further told that the question was about removing to the United States Court a cause to which the legal representatives of Isaac Walker were parties defendant; that all of these representatives except Thomas A. Walker were plainly non-residents of Missouri; that defendants wished to remove cause to the Federal Court; that, if all the defendants had been non-residents, this might have been done, and yet that it was not attempted. It seems difficult to come to any other conclusion than that the citizenship of Thomas A. Walker was the obstacle to the removal, and that some of the other parties interested—not himself—attempted to suggest that he was a citizen of Iowa.

Unless Thomas A. Walker, Isaac H. Walker, and Mr. and Mrs. Williams are not only mistaken, but completely wrong, there is no warrant for saying that Thomas A. Walker has ceased to reside in Missouri. Their testimony apart, the evidence of such change would scarcely be sufficient; but, leaving out all the other witnesses for the executor, the testimony of these four is more than sufficient to outweigh a far stronger *prima facie* case than was made by the petitioners. Much of the evidence adduced to show that the executor had changed his residence was wholly inadmissible. That some third person, without his knowledge or concurrence, had put his name down on the register of voters, or in the city directory, scarcely deserved to be

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characterized as evidence at all; that he furnished his wife with a carriage was equally worthless. We see not the smallest reason to discredit what the four witnesses named above have sworn to; we see as little to lead us to conclude that the Circuit Court discredited it. All that we do see on that head is that the Circuit Court applied to the facts in evidence principles of construction which we regard as erroneous. We have already indicated our views on this head. The subject is discussed at length, with a copious citation of authorities, in 1 American Leading Cases (notes to the case of *Guier* v. *O'Daniel*, 557, and following). The judgment of the Circuit Court is reversed and final judgment is given in this court dismissing the proceedings. All the judges concur.

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163s 375

WALTER GAMAGE *et al.*, Respondents, *v.* ISAAC BUSHELL, Appellant.

March 7, 1876.

Where the devisee under the will sued the executor for the recovery of rents of the estate, by him collected, the estate being unsettled and possibly in an insolvent condition, *held*, that there could be no recovery.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Farish & Griffin, for appellant, cited: Stephen's N. P. Assump. 332–343; O'Fallon *v.* Boismenu, 3 Mo. 286; Clarence *v.* Marshall, 2 C. & M. 502; Wag. Stat. 89, sec. 48.

John Burke, for respondents, cited: Aubuchon *v.* Levy, 23 Mo. 99; 71 Ill. 487; 38 Me. 593; Gibson *v.* Taylor, 16 Mass. 280; 3 Kent's Com. 625; Chambers *v.* Wright, 40 Mo. 482; Kohler *v.* Knapp, 1 Bradf. (N. Y.) 241; Taylor's L. & T. 283, sec. 390; Redf. on Wills, 170, sec. 7, p. 120, sec. 17; Drinkwater *v.* Drinkwater, 4 Mass. 358;

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Wag. Stat. 89, sec. 50; Papin *v.* Allen, 33 Mo. 260; Jones *v.* Putnam, 29 Mo. 456; 28 Mo. 248; 43 Mo. 350; McLain *v.* Rigg, 30 Mo. 268; Thompson *v.* Russell, 30 Mo. 498; White *v.* Gray, 32 Mo. 447; 43 Mo. 122; Easly *v.* Ellert, 43 Mo. 289; Bush *v.* Christman, 53 Mo. 482.

GANTT, P. J., delivered the opinion of the court.

Mary C. Gamage and Walter, her husband, sued Bushell to the April term, 1873, of the St. Louis Circuit Court, for $730, which they alleged that he had received to their use. The answer of defendant denied that plaintiffs were married, and denied that he was indebted to plaintiffs in the sum of $730, or any other sum, for money had and received to the use of plaintiffs. The case was tried in June, 1873, by the court without a jury, and there was a judgment for plaintiffs in the sum of $630.

By the bill of exceptions it appears that Bennett, a witness for plaintiffs, testified that he rented premises No. 205 Summit avenue, from defendant, and paid him rent therefor amounting to $560; that he rented the premises from Bushell, executor of Long, from month to month; that Bushell had certain repairs done to the property.

The plaintiffs then gave in evidence the will of Mary C. Long, by which she devised the premises rented to Bennett to Mary C., wife of Walter Gamage. This will was admitted to probate June, 1871. The defendant was appointed executor of it.

Bushell was sworn, and testified that he made certain repairs, for all which, except $18, he was allowed credit by the Probate Court; that the estate was unsettled, and that there were claims in suit against it which, if established, would make the estate insolvent.

No exceptions are saved by the record. No instructions appear to have been given, and the only questions we can consider are, first, whether the petition discloses any cause of action; second, whether the evidence warrants a recovery, supposing the petition to be good.

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1. In *Biddle* v. *Boyce*, 13 Mo. 532, a demurrer was sustained to a petition setting forth that plaintiff was the owner and proprietor of a lot of ground in the city of St. Louis (describing it), and that defendant had received the rents of it, to the amount of $250, and converted the same to his own use; that the money so received belonged to the plaintiff, and that the defendant was requested to pay it to him, but refused. The Supreme Court was of opinion that this petition was not a sufficient statement of a cause of action.

In the present case, the petition would not have been a good count in *assumpsit* for money had and received to the use of plaintiff, as it omits to lay a promise to pay the same to plaintiff, nor does it show the source from which the money was received. There can be no doubt that the intention of the Practice Act of 1849 was to make all pleadings special, to abolish general averments stating conclusions of law, in a declaration or petition, as well as similar general averments in a plea or answer. It was meant that the pleadings should be a statement of the facts of a case on both sides; not of the evidence, but of the facts to which the law was applicable.

It is clear that the petition in this case does not come up to this requirement. But the objection was not taken by demurrer, and it may be that the defects referred to are cured by verdict. *Bury* v. *St. Louis*, 12 Mo. 298; 2 Wag. Stat. 1036, sec. 19.

2. It does not appear that the Probate Court has made any order for the delivery, by the executor, of the possession of the real property, whose rents are the subject of controversy here, to the devisee. 1 Wag. Stat., Art. 11, sec. 49, p. 89, title Administration. It does appear that the estate was unsettled when this suit was brought; that there were claims in suit against it which, if established, would make the estate insolvent; and that less than two years had elapsed from the death of the testatrix when this suit was brought. It also appeared that defendant, as executor, had

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taken charge of, and leased, this property, though without a formal order of the Probate Court. Under these circumstances the rents were assets in his hands. He was liable for them on his executor's bond (*Dix* v. *Morris*, decided this term); and, if the claims in suit against the estate of his testatrix should be established, he may be obliged to account for them to the creditor.

There is a very reprehensible looseness in this record. Proof was made by word of mouth, without objection, of matters which properly should have been established in a very different way. When parties intend, as was, perhaps, the case here, to waive the regular proof of material facts, it is easy to make a statement to that effect; and such is undeniably the better practice. The proof was made here without objection, and we would, perhaps, defeat the intentions of both parties if we failed to accept the conclusions indicated. We, therefore, take it as proved that Bushell, as executor, received the rents and profits of this property during the two years following his testatrix's death; that her estate is unsettled, and that it may be insolvent. Under these circumstances we are of opinion that he is not liable in this action. If the claims pending against the estate of Mrs. Long be defeated, plaintiffs have a clear remedy by resorting to the Probate Court. If the claims pending be established, it would be inequitable that a devisee should receive rents to the prejudice either of the creditors of the estate, or the executor.

The judgment is reversed, Judge LEWIS concurring; Judge BAKEWELL, having been of counsel, not sitting.

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68 374

Ann Stoops, Respondent, *v.* Gottlieb Wittler, Administrator of F. W. Wittler, Appellant.

March 7, 1876.

In the absence of fraud or collusion, payment, or a clerical error in the entry, a judgment against the principal, where the surety has been a party defendant and has filed an answer, will be conclusive against such surety, though the suit was dismissed as to him before the trial.

Appeal from St. Louis Circuit Court.

Affirmed.

Gottschalk, for appellant, cited: Lartique *v.* Baldwin, 5 Marlon, 193; Beall *v.* Beck, 3 Har. & M. (Md.) 242; McKeller *v.* Powell, 4 Hawks (N. C.), 34; Mooris *v.* Lucas, 8 Blackf. (Ind.) 9; King *v.* Norman, 4 C. B. 884; Hermann on Estop. 49, 51; 1 Wag. Stat. 269, sec. 1; Freem. on Judg., sec. 189.

M. Kinealy and *Daniel Dillon*, for respondent, cited: Roger *v.* Williams, 4 McLean, 577; 1 Greenl. on Ev., secs. 522, 523; State, to use, *v.* Coste *et al.*, 36 Mo. 437; State of Ohio, etc., *v.* Colerick, 3 Ham. (Ohio) 487; 1 Pars. on Notes & Bills, 207, and notes.

Bakewell, J., delivered the opinion of the court.

Plaintiff proved up, in the Probate Court, a demand against the estate of Frederick W. Wittler, deceased, founded on a promissory note by one Henry Wittler, payable to plaintiff, and on the back of which F. W. Wittler had written his name as surety. On trial anew in the Circuit Court, defendant admitted that deceased had written his name on the note as surety for the maker, and the note was read in evidence. Defendant then offered to show, in defense of the claim, that there was a total failure of consideration for said note as between plaintiff, the payee, and Henry Wittler, the maker, for whom deceased, Frederick W. Wittler, defendant's intestate, was surety. To the introduction of this evidence plaintiff objected, on the ground that the facts

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relied upon as a defense by the surety had been fully adjudicated and determined in a suit between the plaintiff herein and Henry Wittler, the maker of the note in question, and that judgment was obtained therein against said Henry Wittler, which judgment is still in force and unsatisfied; and it appearing, by an inspection of the record in said suit, that the fact is as stated, the record of that suit was offered in evidence, whereby it further appeared that deceased was originally a party defendant, and, together with Henry Wittler, filed a joint answer thereto; and the jury was instructed by the court that, on the evidence and admissions, plaintiff is entitled to recover.

There was a verdict and judgment for plaintiff, and, all exceptions having been saved, and a motion for a new trial overruled, the case is brought to this court by appeal.

In *Greerside* v. *Benson*, 3 Atk. 252, Lord Hardwicke held a judgment against the principal debtor conclusive in an action against the guarantor. But the rule is not established in this country, and the decisions are conflicting.

It has been repeatedly held, in actions on bonds against the sureties of executors and administrators, that a judgment against the estate of the testator or intestate is conclusive on the sureties; but in those cases the form of the bond is such that they are not in point.

The question is elaborately discussed in *Douglas* v. *Howland*, reported in 24 Wend. 58. The Superior Court held a judgment against the principal conclusive against the surety, and, on appeal, this decision was reversed. Judge Cowen delivered the opinion of the court, and reasons, at great length and with force, in favor of the rule that, in a suit against the surety, the judgment against the principal should not be conclusive; and he cites two cases, one in Maryland and one in North Carolina, in support of his view. His attention does not appear to have been called to *Slee* v. *Bloom*, 20 Johns. 669, decided by the Court of Errors in 1822, with which his ruling does not seem to be in

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accord. The opinion in this case is by Ch. J. Spencer, the weight of whose name is very great.

In *Berger* v. *Williams*, 4 McLean, cases bearing upon this question are reviewed, and the opinion of Judge Cowen, cited above, is particularly examined.

The case turns upon this point, and the Circuit Court of the United States, for the seventh circuit, decides that the surety is concluded by a judgment against his principal. In our own State there has been no authoritative decision on this point. In *State, to use*, v. *Coste*, 36 Mo., it was decided that a judgment in favor of the principal is a complete discharge to the surety; but that a judgment against the principal would conclude the surety is quite another proposition, and one that must rest upon grounds entirely distinct from those which are manifestly sufficient reasons for the former rule.

Stewart v. *Thomas*, 45 Mo., is a case which essentially differs from the one under consideration. Judgments had been rendered against the sheriff on his bond for an unlawful levy, and he afterwards sued the plaintiff in the execution on his bond of indemnity. It was held that the latter might make any defense that could have been made in the original suit against the sheriff, and that notice, with an opportunity of making this defense, should have been given to the plaintiff in the execution at the time of the first suit; otherwise, the judgment is but *prima facie* evidence of his liability on the bond. In that case the defendant had given the sheriff a bond to indemnify him from all loss or damage on account of a certain seizure and sale. When the claimants of the property sued the sheriff, he gave no notice to the party who had given him an indemnifying bond, and made no defense, but suffered judgment by default against him, when he had a good defense. He was damaged, therefore, not by the seizure and sale, but by his own laches in making no defense and giving the defendant no opportunity to make one, which he might have done in the original suit. The opinion

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of the court is delivered by Judge Bliss, who says: "It would be contrary to the first principles of justice to hold a person conclusively bound by a judgment who was not a party to the proceeding, and who had no opportunity to appear and defend, or assist the defense, even if there was no actual fraud; much more so when there was a good defense and judgment by default. In such case, where there is an obligation to indemnify the person against whom a judgment is rendered, in a suit to enforce such obligation the defendant should be permitted to make any defense which could have been made to the original suit. Notice, with opportunity of making defense, should have been given defendants; otherwise, the judgment is but *prima facie* evidence of defendants' liability on their bond. Defendants' general liability on their bond to indemnify plaintiff against all damages is to be distinguished from a liability to pay a judgment, or to do something dependent on the result of a specific litigation."

The reasoning of the learned judge is upon the case presented, which was similar to, and yet essentially different from, the one at bar. In *Stewart* v. *Thomas* the sheriff had a good defense, and let judgment go by default, without notice to the parties that covenanted to indemnify him; yet, even there, the court says that the judgment was *prima facie* evidence against the surety, and intimates that, with notice, it might have been conclusive. In the case before us, notice was given, the defense was made, and judicially passed upon and found worthless.

The rule is that a judgment binds none but parties and privies. This rule is not entirely without exceptions, and it is held that the court will not always again decide precisely the same questions about the same subject-matter, although the parties may be changed. If the defendant in the case before us was not a party to the suit against his principals, he can hardly be said to have been a stranger to it. He had notice, for he was at one time a party defend-

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ant, and filed an answer, as the record shows. The suit was dismissed as to him before trial—for what reason does not appear, and can be of no importance, as, if it was dismissed for his death, that did not do away with the fact of notice. If notice is to be regarded as necessary, it was given. As to its necessity, we need not decide.

The action of the Circuit Court in this case, and its direction to the jury, was, in effect, a declaration of law that, in the absence of fraud or collusion, payment, or a clerical error in entering the judgment, a judgment against the principal is conclusive against the surety, though he be not a party to the suit, if he have notice of the proceeding, or, at least, where he has been a party defendant and has filed an answer, though before trial the suit be dismissed as to him.

We incline to think that such a declaration of law has the support both of reason and authority. In the absence of fraud, the judgment against the principal established, we think, the liability of the surety. If there was fraud, the surety may show it; if there was a mistake in the entry of the judgment, he may show that. The right of the plaintiff to recover on the note has been once settled after a contest, and, had the judgment been the other way, the surety might have pleaded it as a bar to this action. The right to recover from the maker of the note having been decided, the liability of the surety would seem to follow as a matter of course; he has agreed to pay this debt, if it were a genuine debt, for which his principal was liable, and the judgment, in the absence of fraud, seems to establish that liability.

The judgment of the Circuit Court is affirmed. The other judges concur.

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ANTHONY C. WILLIAMSON, Respondent, *v.* EDWARD L. GOTTSCHALK, Appellant.

March 7, 1876.

A mortgagee of personal property, having brought an action of replevin against a second mortgagee who was in possession, the defendant brought into court the money due on the first mortgage and tendered it to the plaintiff. He did not plead his second mortgage, but relied on his possession and this tender. The plaintiff replied that since the commencement of the suit he had sold the property, under his first mortgage, to a third person. *Held,* 1. That the first mortgagee (plaintiff) was justified in replevying the property. 2. Upon the payment or tender of the debt, to secure which the mortgage was given, he was compellable to give up the property. 3. If before such tender he had, under the terms of the mortgage, sold the property, he will be excused for refusing the tender and failing to give up the property, but the burden of showing that he has so sold it lies on him, and, in the absence of all evidence on this subject, the court must presume that no such sale was made.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Gottschalk, for appellant, cited: 1 Hill. on Mort. (4th ed.) 323, sec. 2; Dixon on Subrogation, 20; Mullanphy *v.* Simpson, 3 Mo. 492 (Houck ed. 262); Wolf *v.* Watter, 56 Mo. 292; Schouler on Pers. Prop. 558; Powers *v.* Powers, 11 Vt. 262; 2 Perry on Trusts (2d ed.), 176, sec. 602; Davis *v.* Warfield, 38 Ind. 461; Gibson *v.* Mosier, 9 Mo. 257 (Houck ed. 154); Smith's Ld. Cas. (Hane & Wall. ed.) 274, 216; 2 Greenl. on Ev., title Tender, secs. 569, 600; Eslow *v.* Mitchel, 26 Mich. 500: Adams *v.* Helm, 55 Mo. 468; Wag. Stat. 1026, sec. 14; Beale *v.* Dale, 25 Mo. 301; White *v.* Van Houton, 51 Mo. 557.

Bell & Thompson, for respondent, cited: Pemie *v.* Poulson, 53 Mo. 310; Wolf *v.* Walters, 56 Mo. 292; 1 Tidd's Pr. 643.

GANTT, P. J., delivered the opinion of the court.

Williamson, the holder of the first deed of trust on certain chattels, sued Gottschalk, who had possession of them, in

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replevin. Prior to the commencement of the suit, Gottschalk offered to pay to Williamson the balance due on the note secured by his deed. Williamson was willing to accept this money and release the deed of trust, but Gottschalk seems to have wished to keep the incumbrance alive. On this point the negotiations fell through; Williamson sued to replevin, and Gottschalk, not setting up that he was the holder of a second deed of trust, pleaded that he had tendered to Williamson the balance due under the first, before suit, and brought the money into court, offering to Williamson's acceptance. The plaintiff denied the tender, and alleged that, since the commencement of the suit, he had disposed of the property under the first deed of trust, and that one Bishop had become the purchaser.

It appeared in evidence that the first deed of trust was executed by George S. Schwartz, dated November 1, 1871; the second on December 28, 1872. Only $58.65 was due under the first incumbrance when this suit was commenced. The defendant, it will be seen, did not set up his second deed, but relied on his possession and the tender of the amount due under the first. Each deed was duly acknowledged and promptly recorded. Plaintiff gave in evidence the deed dated November 1, 1871. A. R. Neal, for plaintiff, testified that he saw W. B. Thompson purchase the note secured by the first deed of trust, on which there was a balance due of $57 or $58, by paying that sum therefor. That witness purchased the property in July, 1872, from Jacob K. Schwartz; that George Schwartz was then in possession of it.

Defendant offered in evidence a bill of sale from George S. to Jacob K. Schwartz. The court, on plaintiff's objection, excluded this instrument, and defendant excepted.

Defendant then asked leave to amend his answer so as to show that he claimed as second incumbrancer. The court refused leave, and defendant excepted. Defendant then offered the deed from Jacob K. Schwartz to George S.

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Schwartz, dated December 28, 1872. The court excluded this paper, and defendant excepted. Plaintiff admitted that the balance due on the note secured by the first deed had been paid into court by defendant.

The court instructed the jury as follows, defendant excepting:

1. "If the jury believe from the evidence that the plaintiff was the trustee of a deed of trust executed by George S. Schwartz, dated November 1, 1871, and that said deed of trust was unpaid and unsatisfied at the commencement of this suit, and that the property described in said deed of trust was the same property in possession of defendant, and was of the value of $300, then they will find for the plaintiff."

2. "The jury are instructed that, upon the issues joined in this case, the only question to be determined between plaintiff and defendant is whether the note and deed of trust executed to plaintiff, dated November 1, 1871, conveyed the personal property described in the petition, and that the same was of the value of $300, and was in possession of the defendant at the commencement of this suit and the service of the writ of replevin, and at the time of the service of the writ of replevin in this action the note and deed of trust were paid and satisfied; and if they find from the evidence that the personal property described in the petition was in the possession of defendant, and was the same described in said deed of trust, and was of the value of $300, and that said note was not paid or satisfied at the time of the service of the writ of replevin and of the filing of this suit, then they will find a verdict for the plaintiff."

Defendant asked the following instructions, which the court refused, defendant excepting:

1. "The court instructs the jury that plaintiff, under his deed of trust, was only entitled to the possession of the property, herein sued for, for the purpose of securing to him the payment of the sum remaining unpaid; and if the jury find

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from the evidence that such sum was either paid to him or tendered to him by the defendant, and that defendant had at that time a right to the property, or was in possession thereof, then said tender extinguished the right of possession as against the defendant, and the jury will find for the defendant."

2. "The court instructs the jury that if they believe from the evidence that, prior to the sale under the deed of trust from George S. Schwartz to Williamson, read in evidence by plaintiff, the defendant, being the trustee in a later deed of trust which covered some of the same property conveyed in said first-mentioned deed, tendered to said Williamson, or to the legal holder of the note secured by said first deed, all that was due on said note or under said first deed, and has ever since been ready to pay such money, and deposited the same in court, and that the plaintiff refused to receive the money due, but brought the suit against this defendant, who was at that time in actual possession, claiming an interest therein, then plaintiff cannot recover in this action."

3. "If the jury find from the evidence that defendant, being a second incumbrancer, did, before the bringing of this suit, offer and tender to the plaintiff herein, or his *cestui que trust*, the amount of his claim remaining unpaid under the prior deed of trust, and said plaintiff, or his *cestui que trust*, refused to accept the same, then they will find for the defendant."

The jury found a verdict for plaintiff, and, after the usual motions, defendant appealed.

1. This is not a satisfactory record. There must be some errors of a clerical nature in it. The first deed of trust was made by George S. Schwartz, and was dated November 1, 1871. In July, 1872, Neal testifies that he bought the property from Jacob K. Schwartz, and that George S. Schwartz was then in possession. But defendant claimed, or professed to claim, under a deed executed by Jacob S.

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Schwartz to George S. Schwartz's trustee, dated December 28, 1872, nearly six months after Neal purchased from Jacob K. Schwartz. A bill of sale from George S. to Jacob K. Schwartz, dated December 28, 1872, had been excluded. The transaction is not explained, and, as Neal does not intervene, we will treat him as if his rights, if any, were not involved in this controversy.

2. The second instruction given at the instance of the plaintiff is confused and unintelligible as to the first half of it; and, in the second, it mistakes the law. It tells the jury that, if they find, among other things, "that said note had not been paid or satisfied" at the commencement of this suit, they must find for the plaintiff. Now, it is plain that if the jury had found all the other matters indicated by the instructions, and that the note had not been paid, but had *been tendered*, before the commencement of this suit, plaintiff was not entitled to a verdict. In order to make this instruction anything but a misleading declaration, such a qualification should have been added. It was quite consistent with this instruction that the plaintiff, wantonly refusing the money secured by his deed of trust, went on to sue in replevin, and, having got the property in his hands, claims to hold it against the tender of money brought into court with the answer of defendant; for there was no evidence whatever of the sale set up in the reply of the plaintiff. This was a matter to be proved. No evidence was given of it, and, if the court meant to say that no issue existed as to its having been made, we think it mistook the law. Yet the court, in its instruction under consideration, seems to tell the jury there was only one question before them, and then proceeds to tell them what members or particulars that question embraces. But in this enumeration it omits all reference to the issue, raised by the reply, respecting the sale of the property under the first deed of trust.

If the defendant made no tender of the money due under the first deed of trust, plaintiff was justified in replevying

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the property. But if the defendant brought into court with his answer the money so due, and tendered it to the plaintiff, then the proper judgment would have been for the return of the property to defendant, he paying all costs.

If, before such tender was made, plaintiff had sold this property, in pursuance of the provisions of the deed of trust, that would cut off any claim of the second incumbrancer, which defendant asserts that he is. Now, plaintiff asserts in his reply that he has made such a sale, but there is no evidence of it in this record, and we must, therefore, treat it as non-existing. It is, then, the case of first mortgagee suing mortgagor, or second mortgagee, and tender made of the debt secured by the mortgage, the money tendered being paid into court. This is all; and we fail to see why defendant was not, by reason of this payment, entitled to have the property returned to him, he paying all the costs incurred up to the payment.

The judgment is reversed and the cause remanded, all the judges concurring.

Solomon G. Kitchen, Respondent, *v.* Charles B. Clark, Appellant.

March 9, 1876.

1. K. employed C. to make certain plans and specifications, but refused to receive or pay for them when finished, whereupon C. sued and obtained judgment for a sum smaller than that which he testified, at the trial, they were worth; K. then demanded the plans and specifications, which C. refused to deliver, whereupon K. satisfied C.'s judgment, and instituted this suit, in which he recovered judgment for the value as formerly sworn to by C. *Held*, that K. was restricted, in damages for the conversion, to the value as adjudicated in the former suit; upon respondent's remitting the excess, final judgment is rendered in his favor for the amount of the adjudicated value, with interest from the commencement of this suit.
2. A tender, to be effectual, must be unconditional.

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APPEAL from St. Louis Circuit Court.

Reversed and judgment.

Lee & Adams, for appellant, cited: Clark *v.* Kitchen, 52 Mo. 316; Burt *v.* Dewey, 40 N. Y. 283; Curtis *v.* Groat, 6 Johns. 168; Osterhout *v.* Roberts, 8 Cow. 43; Sanderson *v.* Coldwell, 2 Aik. (Vt.) 203; Jones v. McNeil, 2 Bailey (S. C.), 466; Sharp *v.* Gray, 5 B. Mon. (Ky.) 4; Greenl. on Ev. (2d ed.) 225; Stark *v.* Kenan, Exr., 11 Ala. 818; Pars. on Con. (2d. ed.) 644; Breed *v.* Hurd, 6 Pick. (Mass.) 356; Hike *v.* Clark, 55 Mo. 105; Campbell *et al. v.* Johnson, 44 Mo. 247; Speck *v.* Riggins, 40 Mo. 405; Shephard *v.* Hampton, 3 Wheat. 200; Logan *v.* Small, 43 Mo. 254.

Pope & McGinnis, for respondent, cited: 1 Wag. Stat. 347, sec. 34; Routhel *v.* Dezetter, 43 Mo. 145; Clark *v.* Moody, 17 Mass. 248; Bank of Missouri *v.* Benoist, 10 Mo. 521; Carter *v.* Feland, 17 Mo. 383.

GANTT, P. J., delivered the opinion of the court.

The petition on which this cause was tried was filed at the June term, 1873. It stated that, in 1871, defendant, for value, promised to make and deliver to plaintiff a certain plan with detail drawings and specifications; that defendant made the plan and plaintiff paid its value, viz., $338.50, but defendant refused to deliver it; that it was worth $555, and for that sum plaintiff asked judgment. *Also*, that for the further sum of $156.50 defendant promised and agreed to make a certain other plan for plaintiff; that he made it and was paid for it, but has refused to deliver it; that it was worth $260, and for that sum plaintiff prayed judgment. *Also*, that defendant agreed and promised to make for plaintiff, for the further sum of $180, a certain other plan, etc.; that defendant made it, and was paid for it by plaintiff, but has refused to deliver it, wherefore plaintiff asks judgment for its value, which is alleged to be $295 and interest. *Also*, that defendant agreed to make for plaintiff a certain other plan and specifications, and superintend the building of a dwelling-house for plaintiff *in or near* the city of St.

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Louis, the cost of which was not to exceed $10,000; that plaintiff has done everything required of him, but defendant has neglected everything to be done by him, occasioning great loss, inconvenience, and discomfort to plaintiff, who claims damages for the breach of this contract in the sum of $5,000.

The answer of defendant denied that he made or violated any such contracts as are set forth in the petition. The answer is almost a reproduction of the petition in negative terms.

At the trial the fourth cause of action was abandoned, and the matter therein stated was formally struck from the petition. A jury were sworn, who returned a verdict for the plaintiff for $538.50 on the first count, for $356.50 for the second count, and $380 for the third count. Judgment was given accordingly.

By the bill of exceptions it appeared that, at the trial of the cause, Kitchen offered in evidence the record of a former suit, when Clark (now defendant) was plaintiff and Kitchen (now plaintiff) was defendant. This suit was begun in December, 1871. It was for the sum of $1,106.18, alleged to be the value of certain plans and specifications made by Clark for Kitchen and not paid for. Kitchen denied all the allegations of that petition, and there was a trial, and judgment for plaintiff for the sum of $675. Plaintiff (Clark) testified in that cause that he made the plans sued for; that he charged Kitchen, and told him that he charged him, 5 per cent. for making plans, drawings, detail plans, and superintending the work; for the first plan, the work to cost $18,500, the charge was 8 per cent; for the second plan, it was 2 per cent. on $12,256; and for the third plan, 2 per cent. on the lowest estimate, $14,000. Kitchen told him to send the bills to his office. Clark did this, and Kitchen refused to pay.

Mitchell, a witness for Clark, testified that the usual charge for general design and specifications was 1 1-2 per

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cent., and 1 per cent. for detail drawings. The bills shown to witness were approved by him. He said that in buildings of first class the prices were 3 per cent. on buildings to cost from $15,000 to $30,000, and the charge of 3 per cent. on $18,500 was fair.

(By this it would seem that the bill of exceptions is wrong in making Clark say that he charged 8 per cent. on $18,500. It does say this, however, very plainly.)

This was the evidence of plaintiff. Defendant, Kitchen, testified at length respecting the contract, but what he said is immaterial here. The record was read in evidence.

Mr. Davis testified for Kitchen, in this case, that at the former trial Clark had testified that he made the plans then sued on for Kitchen, under the contract therein referred to; that the prices therefor charged were reasonable, and they were worth $1,106.18.

Kitchen then proved that before this suit was brought he demanded these plans from defendant, who refused to deliver them. This was after the determination of the former suit, but before payment had been made of the judgment there had. There was a doubt whether Kitchen's attorney offered to pay the judgment if the plans were delivered; but it was admitted at the trial that it had been fully paid before this suit was brought.

The following instructions were given for Kitchen:

1. "The court instructs the jury that an offer to pay need not be accompanied by the actual production of the money; but if the money is declined before it is produced, the tender is complete on the refusal to receive it."

2. "The court instructs the jury that the effect of the verdict and judgment in the case of *Clark* v. *Kitchen*, and payment thereof by plaintiff before the filing of the petition in this case, was to vest in plaintiff the title to the plans, specifications, and detail drawings described in the first-mentioned suit, and entitled plaintiff to the possession of them; and if the said plans, specifications, and detail drawings are

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the same that are described in the petition in this cause, and plaintiff demanded them from defendant and offered to pay, and has paid, the judgment in the case of *Clark* v. *Kitchen*, and that all this was done before the commencement of this suit, they must find for plaintiff."

We have somewhat shortened the language of the second instruction, but have preserved its sense and meaning.

The case is, shortly, this: Clark sued Kitchen to recover damages for Kitchen's refusal to pay for making certain plans, and recovered judgment for $675. Then Kitchen sued Clark for the plans themselves, which Clark refused to give up, and recovered judgment for $1,275. In the first case, $675 was declared to be what Clark was entitled to receive for making the plans. In the second case, $1,275 was what he was declared to be liable to pay for detaining them. One of the reasons for the motion for a new trial was that the damages were excessive.

1. No circumstances of aggravation were shown entitling the plaintiff, Kitchen, to damages, except such as naturally and legally resulted from the refusal of defendant, Clark, to deliver to him certain enumerated plans. There is no doubt that the recovery in the action brought by Clark against Kitchen, and the satisfaction of the judgment, vested in Kitchen the title to the things for making which he was sued. It was alleged that the price of making them was $1,106.18. It appeared in evidence that, at the trial, Clark had testified that they were worth that sum. The jury, however, gave him only $675. But the plans, by the payment of this sum, became the property of Kitchen. 2 Kent's Com. 388, and notes; *Livingston* v. *Bishop*, 1 Johns. 290; 1 Greenl. on Ev., sec. 533. It would be easy to multiply the cases cited.

2. When the suit was brought against Clark, he had received full payment of this judgment; but this was not the case when the demand and refusal occurred. There was no tender of payment when this demand was made—

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only a declaration of readiness to pay when delivery was made. This will not answer. There must be an *unconditional* offer to pay what is due. If the person to whom it is payable, when informed of the intention of the person proposing to pay, refuses to receive it at all, the party having it to pay need not go through the idle form of counting it out. But, first of all, there must be a clear and plain offer to pay, without exacting anything in return, in order to constitute a tender. 1 Chit. Gen. Pr. 508, and notes, and notes to 3 Shars. Bla. Com. 303. There was no offer of that kind here. The strongest expression used by Mr. McGinniss, the witness, falls much short of it. To the question by the court, "Was payment made then?" he replied, "The payment was not made at that time. At the time I called there, payment had not then been made for the plans. I offered payment on their delivery to me. He said, 'You cannot get them; go to my lawyer.'"

This is all that was said on the subject of a tender, and, obviously, here was no tender. To offer money on condition of a receipt being given for it is enough to vitiate a tender; for which we refer to the authorities already cited. In the case at bar, the condition was one on which Clark not unnaturally wished to consult his legal adviser; though we do not think that his legal adviser should have hesitated as to the answer to be given when consulted.

At a later period, and before the commencement of this suit, Kitchen appears to have paid the amount of this judgment. If, after that, demand had been made for the plans, and Clark had refused them, that refusal would have been evidence of a conversion. It was the satisfaction of the judgment which transferred the property in these plans to Kitchen; but nothing short of that had this effect. See 2 Kent's Com. 388, and notes.

We are, therefore, of opinion that there was error in the first instruction given by the court. It invited the jury to

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indulge an hypothesis not warranted by the evidence. There was nothing before them to which it was applicable.

3. The second instruction would be unobjectionable if there had been any evidence of a demand of the plans after the title of Kitchen to them had become complete by the satisfaction of the judgment obtained for their value. But there was nothing of this kind, and, evidently, the court regarded the demand made by Mr. McGinniss, and the refusal of it, as evidence of conversion. For the reasons already given, this was error.

4. If there was a conversion of the plans by Clark, he was chargeable with their value, and interest by way of damages. Their value had been ascertained to be $675 in an action between the same parties. What Clark said on this subject, as a witness at that trial, even if admissible at all, can certainly not outweigh the determination of the fact in issue by the jury which heard both him and Kitchen. If the record of the judgment was legal evidence of the value of the plans, the testimony of the witnesses then examined was not admissible, either to fortify or weaken the conclusion to which that judgment pointed. It is only on the theory that Clark has obtained satisfaction for his plans—that, by means of the judgment and execution, the value of them has been paid to him by Kitchen—that the title to the plans passes to Kitchen. 2 Kent's Com. 388, and other authorities cited above. We do not see the propriety of asking for anything more than this value thus ascertained, with interest, unless it had appeared that this value had undergone a change since the judgment in favor of Clark; and no evidence of that kind was offered.

As we view the matter, the jury were no more warranted, in this case, in giving $1,275 damages in December, 1873, for the conversion of plans which in May, 1872, had been ascertained to be worth $675, than if the conversion had been of a promissory note for $675 and interest, due in

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May, 1872. The damages were excessive; and for this reason the verdict should have been set aside or modified. As above shown, however, we think there was no evidence of a conversion, the only evidence having that tendency being that of a demand and refusal before the accrual of Kitchen's title.

All the judges concurring, the judgment will be reversed and the cause remanded.

GANTT, P. J., delivered the opinion of the court on motion for rehearing.

The respondent asks for a rehearing on two grounds:

1. That the court overlooked section 34, page 347, of Wagner's Statutes, and 43 Mo. 145 (*Raithel* v. *Dezetter*), construing that section.

2. That the court erred in treating as *res adjudicata* the ascertainment of the value of the plans by the former suit between the same parties.

1. As to the first point, we are of opinion that there is an error in the opinion of the court, as first written, to the extent of supposing that, as the pleadings stood, evidence of demand and refusal, or conversion, was necessary. No such evidence, we think, was given; but we also think that the counsel for respondent have shown that it was not necessary, due regard being had to the answer of the defendant, Clark, now appellant.

2. We remain of opinion that the judgment must be reversed for the reason stated in the original opinion; but the correction of the views at first entertained by us on the first point leaves the excessive damages the only erroneous feature of the record. The counsel for respondent, as we understand their proposal, are willing now to remit this excess. We think that if the jury had given Kitchen a verdict for $675, and interest from the commencement of the suit, the judgment must have been affirmed; and, consequently, that the remitting of all but so much as will be

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equal to this amount will fulfill all the demands of justice. But all the costs incurred by Clark in this action, both in the Circuit Court, since December 13, 1875 (the date of the verdict), and in this court, must be borne by the respondent. These costs were incurred in the attempt to rectify an erroneous judgment. These terms being acquiesced in by the counsel for respondent, we give final judgment in this court accordingly. All the judges concur.

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THE STATE OF MISSOURI, Respondent, *v.* CHARLES F. KRING, Appellant.

March 20, 1876.

1. A person charged with a criminal offense, if brought into court ironed, should have the fetters removed, at least from his wrists, during arraignment and trial, and this even though he be fettered because he is considered dangerous, or to guard against an escape.
2. In a trial for murder it is not competent for the defense to prove the contents of letters written by the accused to the deceased.
3. Where the letters and papers found on the accused at the time of his arrest are brought into court, and counsel for the accused, without examining their contents, consent that they may all be offered in evidence and read to the jury by the State, it is too late, on a motion for a new trial, to object that these letters prejudiced the accused, and that counsel had no time to examine them.
4. After the conclusion of the testimony for the State, it should not be reopened. But where a witness for the State was recalled after defendant had opened, for the purpose of being asked a question which he was not permitted to answer, this is no ground for a new trial.
5. Great latitude is allowed counsel in their address to the jury, and, although the line of legitimate argument seems to have been overstepped by the counsel for the State, where the trial court has refused to interfere, the judgment will not be reversed on this ground, unless it is quite clear that the remarks were improper and calculated to prejudice the prisoner.
6. It is not error to instruct a jury that they are not bound to take as true declarations of the accused that have been offered in evidence.

APPEAL from St. Louis Criminal Court.
Reversed and remanded.

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McDonald, Turner & Jones, for appellant, cited: 4 Bla. Com. 323; 1 Bishop on Cr. Proc. 731, 956; Lazer's Case, 16 Howell's St. Tr. 94, 100; Rex *v.* Waite, 1 Leach, 28; 1 Greenl. on Ev. 102; Grant *v.* Thompson, 4 Conn. 203; Kinnie *v.* Kinnie, 9 Conn. 102; McLean *v.* The State, 16 Ala. 680; United States *v.* Sharp, 1 Pet. C. Ct. 118; State *v.* Mix, 15 Mo. 153; State *v.* Mary, 5 Mo. 81; Horkins *v.* The State, 11 Ga. 96; State *v.* Klinger, 43 Mo. 133; Commonwealth *v.* Eddy, 7 Gray (Mass.), 583.

J. C. Normile, Circuit Attorney, for respondent.

BAKEWELL, J., delivered the opinion of the court.

The defendant was indicted by the grand jury of the county of St. Louis for murder, in killing Dora Broemser. At the November term, 1875, of the Criminal Court he was tried and convicted of murder in the first degree. A motion for a new trial having been heard and overruled, defendant was, on February 5, 1876, sentenced to be hanged on the ensuing 24th of March. All exceptions having been saved, the cause is brought here by appeal.

The counsel for appellant have insisted that many errors were committed by the court below. We have carefully scrutinized the record, and find error in one respect alone. The other objections will be noticed in their order in the course of this opinion, but have all been found to be of an unsubstantial character, and none of the alleged errors, with that exception, have, in our opinion, any foundation at all.

1. The record sets forth that, "on the 21st of December, 1875, the cause came on for trial, defendant being present in open court, and represented by his counsel, and the circuit attorney being present, who represented the State. Defendant was brought to the bar of the court, and, having announced through his counsel his readiness for trial, the court thereupon ordered the trial to proceed. Defendant being ironed with handcuffs, or manacles, upon his hands and wrists, his counsel then and there made a motion to the court to have the same removed, which the

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court refused to do, overruling the motion, the court stating that an assault made by the accused on J. G. Broemser, husband of deceased, in open court, when the accused was last here, was the reason why." Defendant's counsel then and there excepted to the ruling of the court; the trial then proceeded, a jury was impaneled, etc.

It is laid down in the ancient books of the law that, though under indictment of the highest nature, as murder or high treason, the prisoner must be brought to the bar without irons or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured by irons. 4 Bla. 322. In the case of Layer (16 Howell's St. Tr. 94), who was tried for high treason in 1722, a distinction was taken, and it was held that the prisoner might be brought ironed, to the bar, for arraignment, but that his shackles must be stricken off at the trial. "My lord," said the prisoner, in the report of that cause, "I hope I shall have these chains taken off, that I may have the free use of that reason and understanding which God hath given me." To which the Lord Chief Justice replies: "As to the chains you complain of, it must be left to those to whom the custody of you is committed to take care that you may not make your escape; when you come to your trial, then your chains may be taken off." To which counsel for the prisoner said: "Your lordship hath limited it as an indulgence extended to him when he comes to his trial that his irons shall be taken off; but I humbly insist upon it that *by law* he ought not to be called upon even to plead till his fetters are off. My Lord Coke (3 Inst. 35) is clearly of that opinion in his Pleas of the Crown; and it is admitted on all hands that, when he comes to be tried, his shackles must be off; and upon debate it was so determined in Cranburne's case. 13 Howell, 222. The only reason for putting of irons at all on a prisoner is to keep him in safe custody; and the reason why they are taken off in the course of proceedings against

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him in a court of justice seems to be that his mind should not be disturbed by any uneasiness his body or limbs should be under." And Ketelby, for the prisoner, says: "He is entitled to have his chains off before he pleads, in point of law;" and he cites abundant authority. Lord Chief Justice said: "No doubt, when he comes upon his trial, the authority is that he is not to be *in vinculis* during his trial, but should be so far free that he should have the use of his reason and all advantages to clear his innocence. Here he is only called on to plead by advice of his counsel; he is not to be tried now; when he comes to be tried, if he makes that complaint, the court will take care that he shall be in a condition proper to make his defense; but when he is only called on to plead, and his counsel by him to advise him what to plead, why are his chains to be taken off this minute, and to be put on again the next?"

In Cranburne's case (A. D. 1696, 13 Howell), when the defendant was brought to the bar in irons (and it differed from the case of Layer in this, that the prisoner was called upon to plead and was tried at the same time), the Lord Chief Justice (Holt) exclaims: "Look you, keeper; you should take off the prisoners' irons when they are at the bar, for they should stand at their ease when they are tried."

And in Waite's case (1 Leach, 43), the prisoner, at the time of his arraignment, desired that his irons might be taken off; but the court informed him that they had no authority for that purpose until the jury were charged to try him. He accordingly pleaded not guilty; and, being put upon his trial, the court immediately ordered his fetters to be knocked off.

And Hawkins says (2 P. C., ch. 28): "Every person, at the time of his arraignment, ought to be used with all the humanity and gentleness that is consistent with the nature of the thing, and under no other terror and uneasiness than what proceeds from a sense of his guilt and the misfortune

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of his present circumstances; and, therefore, ought not to be brought to the bar in a contumelious manner, as with hands tied together, or any other mark of ignominy or reproach, nor even with fetters on his feet, unless there be some danger of a rescue or escape."

And though fetters be allowed on the feet, in case of danger of an escape, all the authorities say that his hands must not be bound, as was done to the prisoner in the case at bar. Coke says so, quoting Bracton and Fleta (2 Inst. 315).

Bracton's language is: "*Cum autem captus coram justiciariis producendus fuerit, produci non debet ligatis manibus, quamvis aliquando compedibus propter periculum evasionis.*" He shall not be brought before the justices with his hands bound, though sometimes, on account of danger of escape, his feet are fettered.

And Fleta, speaking of prisoners when brought up for trial, says: "*Non producantur ligati, ne videantur respondere coacti.*"

So that the rule is unchanging, and at least as old as Magna Charta.

It is not pretended in this case that there was danger of an escape. Had this danger existed, however, we are of opinion that some other means must have been taken to prevent it, and that it would have been error, even then, to keep the prisoner's hands fettered in the presence of the jury during the trial of the case.

It is said in excuse that the prisoner, when last there—by which is probably meant when last in court—had made an assault upon a by-stander. The by-stander assaulted on the former occasion is named in the record, and was not a person whose attendance at the trial was required as counsel, witness, juryman, or officer of the court. It does not appear what interval of days, weeks, or months existed between this former assault and the day of trial; nor that there was any ground to suppose that such an assault would

be renewed. But, be that as it may, it was no sufficient reason for compelling the prisoner to stand his trial for his life with gyves upon his wrists and his hands bound together. Officers of the court could have been placed around him, if he was considered dangerous to by-standers; or he might have been placed in an inclosed space within the bar of the court, as was the English custom. Any proper precautions against escape, or to guard against danger of violence from a prisoner, may be taken during the trial; these may be such as will not deprive his counsel of free communication with him, and will not tend to inflict physical torture upon the prisoner, or deprive him of the freest use of his limbs and of all his faculties in that moment of extreme jeopardy. But it is certainly not permitted to fetter his hands; and, if he is brought into court in irons, he is entitled to have them removed whilst actually on trial; and it is error in the court to refuse to order the prisoner to be unbound.

For this error the judgment must be reversed and the cause remanded, but a most careful examination of the record shows that no other error was committed during the course of this protracted trial. We proceed to take up the other suggestions of error, one by one.

2. A witness having stated that she knew of two letters which the defendant wrote to the deceased, defense offered to prove the contents of these letters. The court refused to allow the proposed evidence as to the contents of these letters. There was no error in this. It is true that the defense set up was that defendant was insane at the time of the homicide. But no suggestion of such a defense had been made at the time of this offer of evidence, and, though it is now claimed that the contents of these letters might have tended to throw light on the mental condition of the accused, no such reason was offered for the introduction of this evidence at the time. It was properly excluded.

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3. Defendant's counsel offered to prove declarations of the mother-in-law of the deceased, in the presence of defendant and the deceased. It is not said when these alleged declarations were made. They could be no justification of the homicide, and were properly excluded, for more than one reason too obvious to mention.

4. The fourth alleged error assigned is thus set forth in the bill of exceptions: "The marshal being ordered by the court to bring the letters and papers which were found upon the person of the defendant at the time of his arrest, did so, and placed the same in the hands of the prosecuting official. Being written in German, the purport of these letters was unknown to the attorneys on either side; whereupon counsel for defendant demanded to look at and examine said papers and letters, but was refused by the attorneys for the State, unless the defense would agree that all papers and documents taken from Kring at the time of his arrest should be read in evidence. To this the defense assented, and, thereafter, said papers, having been translated, were read in evidence without objection; whereby evidence of the crime of arson, committed heretofore, was improperly, as counsel for defense claim, permitted to go to the jury, and extensively commented upon by counsel for the State, all of which was calculated to highly prejudice and inflame the minds of the jury against defendant."

If defendant was prejudiced by the admission of this testimony, it was a consequence of the full consent of his counsel to the introduction of this evidence. The court committed no error in admitting it, for it was not asked to exclude it; but, on the contrary, it was asked to admit it by counsel on both sides. It was the imprudence of counsel to allow these documents to go in without examination. They were manifestly in the custody of the court, and if the court, on proper application, had refused to allow counsel the necessary opportunity to make the proper investigation of this evidence before putting it in, objection might

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have been taken to such action of the court with some show of reason. But to introduce documentary evidence with rash precipitation, and then to complain that the court erred in not giving an opportunity for examination, which it was never asked to afford, is a somewhat unreasonable proceeding on the part of the defense.

5. After the State had rested, and when defendant's counsel had made some progress in examining witnesses for defense, a witness (who had previously been examined in chief for the defense, and discharged) was called to the stand by the judge, and asked the following questions, at the request of a juror, who asked that the witness be recalled: "How soon after the difficulty did you see Mrs. Broemser?" "Did you have any conversation with her?" "Did she tell you what was done on that occasion, as to what Kring did when he stooped over her?" Counsel for defense objected to the recalling of this witness to the stand, as they had opened their case and commenced introducing their evidence, and also to the asking the witness the foregoing questions, on the ground that it was improper, and that the answers to the questions (if answered) would have been incompetent. The court sustained the objection of defendant's counsel as to the witness answering the questions, and he was allowed to retire from the stand. Exceptions were taken by the defense to the action of the court in allowing the witness to be recalled to the stand, and also to the asking of the foregoing questions.

Although the testimony, once closed on the part of the State in a criminal trial, should not be reopened, we fail to see that the court erred in its action in the matter of the recall of this witness. He was not recalled by the State, but by a juror, and, when recalled, was not allowed to utter a word. There was no error in this.

6. In support of a motion for a new trial in the court below, an affidavit was filed of a stenographic reporter who was present at the trial, to the effect that the circuit attorney, in his argument to the jury at the close of the

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case, said, among other things, these: "If you wrong the accused by finding him guilty, that wrong can be righted, because there are two courts above this that the accused can have this reversed—the Court of Appeals and the Supreme Court. If you are not justified in finding this man guilty, it is in their power to rectify an error; while if, on the other hand, you turn the murderer loose in the community, no matter how frail might be the foundation on which you do it, and how frail may be the scaffolding, it takes him forever in the light of freedom again. You will make a wound in this community that will never be healed."

It is insisted that the use of such an argument was grossly improper and illegal, calculated to mislead the jury and to induce them to shift the burden of their responsibility to the appellate court.

There seems to be some abuse of the great latitude allowed to counsel in addressing a jury in remarks of such a character as these; but we are not prepared to say that they were wholly beyond the line of permissible argument. The jury can hardly be supposed to have gathered from these remarks a belief that they would be justified in finding a verdict of guilty without a moral conviction of guilt; or that their action as triers of the fact would be the subject of review in the higher court. Had any such danger been anticipated, it could have been provided against by an instruction. Besides, the remarks were made in the presence of the trial court, which alone knows how these sentences were modified by the context from which, as presented to us, they are wholly dissevered. This matter was urged upon the court below as ground for a new trial, and the court considered that the closing address of the circuit attorney furnished no ground for disturbing the verdict. Nor will we say that it did. We should not have reversed the judgment upon this ground.

7. An exception is saved to the action of the Criminal Court in giving the following instruction for the State:

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"They (the jury) have the right to receive and believe as true, or to reject and disbelieve as untrue, the whole or any part of the testimony of any witness, or the whole or any part of the declarations proven to have been made by the defendant."

Any invasion of the province of the jury is clearly wrong, and where a court undertakes to control the determination of a jury by instructions as to the weight to be given to the testimony of this or that witness, it is error. But to tell the jury they are not bound, because declarations of the defendant are admitted in evidence, to take the statements embraced in any such delarations as necessarily true, is not an instruction calculated to discredit a particular portion of the testimony, but a declaration of law calculated to obviate an error into which a jury might possibly fall, as to the legal effect of testimony of a peculiar character. We do not see that this instruction conflicts with the settled rule that it is error for the court to single out certain testimony and tell the jury that it is entitled to little or great weight. In *State* v. *Hundley*, 46 Mo., the trial court not only told the jury that the testimony of medical experts is not binding on a jury against their own judgment, but further erroneously instructed them to receive all such evidence with distrust, and regard it as entitled to little weight, unless corroborated by the individual judgment of the jury on the same facts. We do not think that the instruction copied above, as given in the case at bar, was indefensible, or that it was error to give it to the jury in this cause.

8. The court refused to give the following instruction, at the instance of defendant:

"If the jury believe from the evidence that, at the time of the shooting, the defendant was so insane as not to know that the act was criminal, the jury should acquit him on the ground of insanity. It is not necessary that the defense of insanity be established beyond a reasonable doubt. It is sufficient if the jury is reasonably satisfied, by the weight

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or preponderance of the evidence, that the defendant was insane at the time of the commission of the act."

It was formerly held in this State that the homicide who relies upon the defense of insanity is not entitled to the benefit of a reasonable doubt as to his sanity. *State* v. *McCoy*, 34 Mo. 531. But this rule has been long since abandoned, and the law on this point declared to be as stated in this instruction. *State* v. *Klinger*, 43 Mo. 127. Nevertheless, the court committed no error in refusing this instruction when asked by defendant, since it was sufficiently and unmistakably embodied in the unexceptionable declarations of law which the court actually gave. It is no error to refuse to give two instructions to precisely the same effect.

9. It is said that the court erred in refusing to grant a new trial on the ground of newly-discovered testimony. But the newly-discovered testimony is cumulative. If it was not cumulative, no sufficient ground for the application was shown. It does not appear by affidavit that the defendant did not know of the alleged new testimony from the first.

10. Lastly, it is said that the verdict is against the weight of evidence. This was a question for the jury, and we might leave it there. But we think it fitting to say that it is difficult to conceive, from this record, how any jury could possibly arrive at any other verdict. It is not shown that defendant was insane. The evidence hardly raises a suspicion as to his perfect sanity. That the defendant is a man of inordinate selfishness and vanity, accustomed to indulge his appetites, and a total stranger to self-control, and that he committed, without the faintest provocation, a treacherous, cowardly, and cruel homicide upon the person of a poor, defenseless woman, whom he had grossly abused or villainously slandered, is clear enough. He killed, also, the unborn child which he well knew she then carried in her womb. The record is searched in vain for any circumstance of palliation. But, unless we are to adopt the theory that all crime is the result of madness, and send our criminals to lunatic asylums instead of to the gallows or the

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jail, it is difficult to see in this record any evidence of insanity which would cast the shadow of a doubt over the calm conviction of a sense of duty well discharged with which the average juror would record his vote of "guilty" against the defendant in this case.

For the violation, however, of a rule of law made for the protection of the accused, and of which defendant did not have the benefit on the former trial of this cause, the verdict and judgment herein must be set aside, and the cause remanded for a new trial, in accordance with this opinion, and it is so ordered. The other judges concur.

THE STATE OF MISSOURI, Respondent, v. HENRY BROWN, Appellant.

March 21, 1876.

An appeal cannot be taken from a judgment sentencing the defendant to death, where the sentence has been executed.

APPEAL from St. Louis Criminal Court.

Stricken from the docket.

Fauntleroy & Clark, for appellant, cited: State v. Perrine, 56 Mo. 602.

J. C. Normile, Circuit Attorney, for respondent.

GANTT, P. J., delivered the opinion of the court.

Henry Brown, having been regularly indicted, was tried and convicted of murder in the first degree, on September 8, 1875. He was sentenced to be hanged October 22, 1875, and was actually executed on that day.

At his trial a bill of exceptions was signed by the judge of the Criminal Court. It is to be inferred either that no attempt was made to obtain an order suspending the execution of the sentence, or that the court to which any application for that purpose was made was of opinion that there was

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nothing meritorious in the prayer. On this head the record is silent.

When the cause was called in this court on March 6, 1876, the circuit attorney suggested the death of the appellant, and the counsel who professed to represent him admitted that he had been executed pursuant to the sentence of the St. Louis Criminal Court.

Thereupon this court ordered the cause to be stricken from the docket, against the protest of the counsel who claimed to represent the deceased, who urged, with much earnestness, that the statutes of Missouri grant the right of appeal in "all cases" of felony; that there was no exception when the felon had ceased to live, and that his right of appeal survived him.

We are of opinion that the counsel (whose zeal and earnestness in behalf of his client are very commendable) has omitted to consider the signification of the term employed by our law-makers. There is no case before the court respecting Henry Brown. We confine our remarks, of course, to the man who was hanged on October 22, 1875, and have no reference to any other person of that name who may be still alive, and, for aught we know, a party to a controversy in some suit, the record of which is lodged in this court in conformity with a writ of error or appeal under the constitution and laws of Missouri. But the case to which *the* Henry Brown who died on October 22, 1875, was a party is at an end. To every "case" there must be at least two parties. It is elementary that "*actor et reus*" are essential to every controversy which can be presented for judicial arbitrament. When either ceases to exist, and is incapable of being represented by any successor, the "case" is at an end. It is so obvious that no person can be put in the place of Brown to do and receive what sentence the court might, if he were still alive, proceed to pronounce, that we feel that we have already taken up too much time with the justification of the order we made when the cause was called. All the judges concur.

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CORNELIUS J. VOORHIS, Respondent, v. JOHN BUSBY, Appellant.

March 21, 1876.

To an action by the payee against the maker of a promissory note, the defendant pleaded that the plaintiff had made to him a note for the same amount, conditioned for the conveyance of a particular tract of land, which conveyance had never been made. Plaintiff replied that a misdescription existed as to this tract of land; that the tract of land intended was another, for which he had made and tendered a deed which defendant refused to receive. The cause was tried by the court sitting as a jury which found for the plaintiff. No instructions were asked on either side. No error appears, and the judgment is affirmed.

APPEAL from St. Louis Circuit Court.

Affirmed.

M. O'Reilly, for appellant.

Davis & Smith, for respondent, cited: Ivory v. Murphy, 36 Mo. 534.

GANTT, P. J., delivered the opinion of the court.

Voorhis sued Busby to the December term, 1872, of the St. Louis Circuit Court, on a promissory note for $2,000, dated July 6, 1872, payable three months after date. Busby answered that, on August 1, 1871, Voorhis made and delivered to Busby a promissory note for $2,000, due January 1, 1872, with a memorandum appended that, if he did not, before the maturity of the note, sell southeast quarter of section 36, township 52, range 7 west, and northwest of northwest section 17, township 51, range 7, then he would convey the land to Busby in fee simple; that the note is due, and that Voorhis has never conveyed the land.

The reply set up that, when the note was executed, there was a misdescription of the land intended; that the second piece was intended to be, and should have been, described as southeast of northwest 17, township 51, range 7 west; that, when the note fell due, he prepared and tendered a deed for the land intended, and defendant refused to receive it and deliver the note.

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The cause was tried by the court sitting as a jury. Defendant objected to the testimony of plaintiff to establish the mistaken description of the land; and then himself testified. It appeared that plaintiff and defendant had been partners; that Busby sold an interest in the business to plaintiff, and took the note mentioned in the answer, agreeing, as set forth in the appendix, to receive in payment 200 acres of land in Audrain county; that Busby did not examine the land, or have any information respecting it, except that it was 200 acres in Audrain county, about ten miles from Mexico. Voorhis had, at one time, 280 acres, but had sold to Quesenbury & Walker eighty acres, which they had the liberty to locate; and Voorhis made the wrong guess as to the piece they had selected. This was the cause of the misdescription. The making and tender of the deed were proved. They seem to have been given in evidence in the court below, but are not shown by the record. No instructions were asked. The Circuit Court gave judgment for Voorhis for the amount of the note described in his petition, and decreed in favor of Voorhis in respect of the matter set up in the answer. Busby moved for a new trial, appealed to the general term, and thence to the Supreme Court, whence the cause was transferred to this court. At the February term, the death of Busby was suggested, and M. D. Lewis, his administrator, appeared for him, and the cause was continued. At this term, it was argued by the respondent, but no argument was offered by the appellant.

We find no error in the record, and affirm the judgment of the Circuit Court. All the judges concur.

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J. W. MITCHELL *et al.*, Respondents, *v.* PETER CURRAN *et al.*, Appellants.

March 21, 1876.

1. An award of arbitrators will not be set aside merely because it is against the law and the evidence.
2. The fact that the verdict is totally unsupported by evidence is not, of itself, evidence of partiality which will warrant the setting aside an award of arbitrators.
3. It is not error for the trial court to look into the question as to whether there is evidence to support the award of arbitrators.

APPEAL from St. Louis Circuit Court.

Affirmed.

Slayback & Haeussler, for appellants, cited: Bluementhal *v.* Torine, 40 Mo. 159; Fraugmans *v.* Hersey, 43 Mo. 122; Easley *v.* Elliott, 43 Mo. 289; Price *v.* Evans, 43 Mo. 397; Allen's Admr. *v.* Richmond, Col., 41 Mo. 307; Penn *v.* Lewis, 12 Mo. 161, 162; McKeon *v.* Citizens' R. R. Co., 42 Mo. 84; Schmeidling *v.* Ewing, 57 Mo. 78, 83; Doering *v.* Saum, 56 Mo. 479; Wag. Stat., ch. 8, sec. 23; Hyeronimus *v.* Allison, 52 Mo. 102; Squires *v.* Anderson, 54 Mo. 197; Tucker *v.* Allen, 47 Mo. 490; Shores *v.* Bowen, 44 Mo. 397; Morse on Arb. 115, 116, 126; Field *v.* Oliver, 43 Mo. 200; Shelbina Hotel Assn. *v.* Parker, 58 Mo. 327; Russ. on Arb. 61 Law Lib. 175, 176, 177; Hall *v.* Hinds, 2 Man. & G. 851; Payne *v.* Bailey, 7 Moore, 147; Boutilier *v.* Thick, 1 Dow. & Ry. 366; Morgan *v.* Mather, 2 Ves. jr. 15; 1 Salk. 71; Wat. on Arb. 161; Bridgman *v.* Bridgman, 23 Mo. 272; Vallé *v.* North Missouri R. R. Co., 37 Mo. 445; Knowlton *v.* Mickles, 29 Barb. 465; Walker *v.* Frobisher, 6 Ves. jr. 70; Russ. on Arb. 186, 187; Passmore *v.* Petit *et al.*, 4 Dall. 272; Field *v.* Oliver, 47 Mo. 200.

Russell & Smith, for respondents, cited: Wag. Stat. 145, sec. 11; Bennett *v.* Russell, 34 Mo. 527; Vallé *v.* North

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Missouri R. R. Co., 37 Mo. 445; Moo. on Arb. 293; Burchell *v.* Marsh *et al.*, 17 How. 344; Morris' C. Co. *v.* Salt Co., 58 N. Y. 667; Shoyer *v.* Barclay, 24 Mo. 346; Brown *v.* Leavitt, 26 Mo. 251.

BAKEWELL, J., delivered the opinion of the court.

It appears from the record in this case that the plaintiffs and defendants were members of the Union Merchants' Exchange, of the city of St. Louis; that a controversy arose between them in regard to the delivery of some meat which was, by agreement, to be delivered by defendants to plaintiffs, and which defendants, it was said, had not delivered according to contract. The parties entered into an agreement according to the provisions of the statute in regard to arbitration, and thereby submitted the matter in controversy between them to the committee of arbitration of the Union Merchants' Exchange, with right of appeal, according to the rules of said Union Merchants' Exchange, to the committee of appeals. The committee of arbitration found for defendants. The committee of appeals set this award aside, and remanded the cause for a new trial. The committee of arbitration again found for defendants, whereupon, on appeal, the committee of appeals found for plaintiffs in the sum of $600 and the costs of arbitration. It appears, from the 6th rule of the regulations of the Union Merchants' Exchange, that the committee of appeals, on hearing an appeal, takes no new evidence, but merely passes upon the evidence, as preserved in writing, taken on the trial before the committee of arbitrators.

The last award of the committee of appeals was made on March 11, 1874. On May 4, 1874, plaintiffs notified defendants that they would, on May 20th, apply to the Circuit Court for a confirmation of the award, and for judgment. On May 23d, plaintiffs filed their motion to confirm the award, and, on the same day, defendants filed their cross-motion to vacate the same, setting forth the grounds named in the statute, and also filed a paper, verified by affidavits, assign-

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ing reasons in support of this motion. The two motions were heard together, and the Circuit Court overruled the motion to vacate, and confirmed the award, and entered judgment thereon for plaintiffs. A motion for a new trial being overruled, an appeal was taken to the general term, where, the action of the court at special term being affirmed, the cause is brought to this court by appeal.

A careful examination of the evidence, as preserved in the record, satisfies us that there is no evidence to support the finding of the committee of appeals, and that the committee of arbitration were bound, upon the evidence as preserved in the record, to find for defendants. Plaintiffs claimed $2,000, and, if entitled to anything, were entitled to $1,200, this being the lowest measure of damage shown by the evidence. But plaintiffs were really entitled to nothing, since it clearly and indisputably appears from the evidence that they refused to receive the meat when tendered according to contract, and refused it on the ground that a part of it had been sprinkled with salt, which sprinkling was done at the express request of their own agent. As the evidence before the committee of appeals was the same written evidence brought before us by this record, it is manifest that they have brought in a verdict without regard to the evidence before them. The question is, can this court interfere? Clearly we cannot, unless it was error in the Circuit Court to refuse to look into the question whether or not there was any evidence to support the finding of the committee of appeals of the Merchants' Exchange, the final arbitrators chosen by the parties themselves.

There are five grounds, and only five, upon which the courts will set aside an award. These are:

1. The insufficiency of the award. That means that it is not certain, final, or mutual; that it does not embrace all matters submitted to the arbitrator; or, that it does embrace matters not submitted to arbitration.

2. A mistake in fact or law *apparent on the face of the award.*

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3. Irregularity of the arbitrators in their proceedings; as a refusal or neglect to examine witnesses, or in not giving notice of the meetings.

4. Corruption or misbehavior of the arbitrator.

5. Fraud, or concealment of evidence, by the parties obtaining the award.

As to the second ground, the mistake, to induce the courts to set aside the award, must appear on its face. When the arbitrator, having made his award, discovers and admits that he has committed an error, the courts have no power, it is said, to refer the matter back without the consent of the parties. *Payne* v. *Bailey*, 7 Moore, 147. When matters of law and fact are referred to an arbitrator, his award is final and conclusive; the courts cannot interfere if he is wrong. *Boutilier* v. *Thick*, 1 Dow. & Ry. 366. If judges chosen by the parties erroneously decide a question of law, the court must abide by the decision. *Wood* v. *Griffith*, 1 Swans. 56. So the courts, for a mistake in a matter of fact—as a miscalculation of figures, or the like—will only set aside the award when such mistake appears upon the face of the award. But the court, on motion, will not enter into the merits at large; for, if they did, no person, it is said, would ever undertake to be an arbitrator. *Morgan* v. *Mather*, 2 Ves. jr. 15; 1 Salk. 71; Watson on Arb. 101, etc.

And the English rule in this matter has in no degree been departed from in Missouri. To vacate an award there must be corruption, partiality, or some misconduct of the arbitrators calculated to prejudice the rights of parties. Errors of law, or incorrect conclusions as to fact, are not sufficient. This has been, from the beginning, the consistent and uniform ruling in this State. In *Newman* v. *Labaume*, 9 Mo. 30, and *Smith* v. *Young*, 11 Mo. 566, it is decided that the terms misconduct, and misbehavior, and partiality, as used in our statute, imply a wrongful intent, and not mere error of judgment on the part of the arbitrators. In *Reily* v. *Russell*, 34 Mo. 524, it is said that this

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is a domestic tribunal, created by the parties; that its object is to avoid expense and delay; that it is not supposed to know anything of law, or of the rules of evidence; and, unless partiality, corruption, gross miscalculation in a matter of figures, or decision in a matter not submitted be shown, the Circuit Court cannot interfere. In *Bridgman* v. *Bridgman*, 23 Mo. 272, the court says that the question is, not whether the arbitrators are mistaken in their award, but whether they were corrupt; that they are the final judges both of the law and the facts. In *Shroyer* v. *Barkley*, 24 Mo. 333, the court says that corruption, fraud, or undue influence must be proved in order to vacate an award; and, in *Vallé* v. *North Missouri Railroad Company*, it is said that an award will not be vacated, on motion, for any mistake of law or fact which does not appear on the face of the record itself. It is, in fact, competent for disputants to leave a question of fact to the decision of a third party, and, if they do so in a binding way, the question becomes, not what the fact is, but what he says it is.

As manifest corruption in the arbitrators will alone suffice to set aside an award under the statute, it is too late for those who, for purposes of economy, or to save time, or for any other equally laudable motive, have chosen to submit a controversy absolutely to a tribunal which is not bound by legal rules, to invoke the protection of those despised rules when mischief has been worked by the disregard of them. They must then stand the hazard of the die. Had the contest been in court, or before a referee, a finding such as that of these arbitrators, upon the evidence presented in this record, would undoubtedly have been set aside, and twenty such findings on the same evidence must have been set aside twenty times. A verdict against the apparent weight of the evidence may sometimes stand, but a verdict without evidence must inevitably fall. But he who submits to arbitration takes his chances, and those who pass upon the controversy are the sole judges of the

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law and the facts, and their action, unless manifestly fraudulent, cannot be reviewed by the courts.

The record in this case shows nothing from which we can see, or from which the Circuit Court could see, that there was any corruption, partiality, or misconduct of the arbitrators. Were the matter *res integra*, the writer of this opinion might be strongly disposed to consider a verdict unsupported by evidence a sufficient proof of partiality; but it appears that, in case of an award, the circumstances of a finding with no evidence to support it is not partiality, within the meaning of the statute; and certainly there is no reason to doubt that these arbitrators were honest enough, and meant to do substantial justice according to their light. Upon what principle they undertook in this case to "split the difference," and give men $600 who were clearly entitled to $1,200, or nothing—and just as clearly bound by the act of their agent, and, therefore, entitled to nothing at all—I cannot see; but with their errors of law and incorrect conclusions as to facts the Circuit Court had nothing to do, and it, therefore, committed no error in confirming the award.

The judgment of the Circuit Court must, therefore, be affirmed. The other judges concur.

Bakewell, J., delivered the opinion of the ccurt on a motion for a rehearing.

This is a motion for a rehearing. It is accompanied with reasons, and counsel for respondents have filed, to support these reasons, a somewhat elaborate brief.

The point decided by this court was, that an award of arbitrators will not be set aside because it is against the evidence, and that it was not error in the Circuit Court to refuse to look into the question as to whether or not there was any evidence to support the award.

In the opinion filed in the cause, some leading English cases, and also decisions of the Supreme Court of this State,

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were cited to show that the English rule has been followed from the first in Missouri, and that, on motion to vacate an award, the court will not enter into the merits of the case itself, and that, where the award is sufficient, in the absence of a mistake in fact or law, apparent on the face of the record, nothing but irregularity of the arbitrators in their proceedings, corruption, partiality, or misbehavior on their part, or fraud or concealment of evidence by the parties will warrant a court in setting aside an award. Counsel now cite authorities which they say have been overlooked by this court.

1. In the first place, they call our attention to the following provision of law in this State. Wag. Stat., ch. 8, sec. 23: "Nothing contained in this act shall impair, diminish, or in any way affect the authority of a court of equity over the awards of arbitrators, on the parties thereto."

We are wholly at a loss to see why counsel supposed that this clause of the statute had escaped the attention of the court. There is nothing whatever in the point decided, or in the reasoning of this court, from which it can be gathered that equity in Missouri has not the same jurisdiction, in case of an award, as has been asserted for it by all the great chancellors of England and America. But that equity will set aside an award purely because it is not supported by the evidence is what is uniformly denied by every text-writer and every authority, elementary or otherwise, to which we have access. As the case before us turns on a motion to vacate an award at law, and is not a proceeding in equity, and as the equity powers of the court below have not been invoked by respondent, it is not at all necessary for the decision of this case to determine what equity would do if its aid was asked, although it is quite plain and settled, if anything at all is settled, that it could grant no relief.

The authorities in our own State which are now called to our attention seem to be in no respect opposed either

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to the point decided by us in the case at bar, or to the reasoning by which that decision is supported. We will notice these cases one by one.

Hyeronimus v. *Allison*, 52 Mo. 102. In this case the court simply decides that, where the mind of an arbitrator is tainted with partiality when chosen, and he conceals the fact, it is a gross fraud, for which equity will set aside the award, and which, under our statute, is good as a defense at law.

The learned judge delivering the opinion of the court, in the course of his reasoning, says that "the strong marks of legislative solicitude that the arm of a court of equity in this regard should not be shortened, manifested in section 23 of the act referred to, make some authorities, which might otherwise be pertinent as showing, under different statutory regulations, a preclusion of equitable interference in cases of this sort, have no applicability when a statute such as ours is in force."

It is nowhere said or intimated, however, that our statute authorizes courts of equity to go behind an honest award to look into the evidence on which it is based.

Squires v. *Anderson*, 54 Mo. 193, is the next case which we are said to have overlooked. But, inasmuch as, in the language of the learned judge delivering that opinion, "the only question presented for the consideration of the court is whether the arbitrators, under the submission, had the power or right to estimate as permanent improvements the increased value of grapevines growing on the farm," and as no question of going into matters not submitted arises in the case at bar, we do not see why, in deciding the question before us, we should have particularly regarded this case, nor why it is cited to us now.

The next case is *Tucker* v. *Allen*, 47 Mo. 488. In this case the award was not attested till after suit, and the arbitrators were not sworn, that formality being waived by the parties. The court decides that these informalities did not

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vitiate the award, and that it is for the court to determine, as a matter of law, what facts are requisite to constitute a valid award.

We again fail to see any principle decided which we have neglected to recognize, or which was material to the decision of the cause before us.

We are next asked to look at *Shores* v. *Bowen*, 44 Mo. 396. We have done so, and see that the award was there vacated because only two of the three arbitrators heard any of the evidence. The court says that the statute is peremptory that "all the arbitrators must meet together and hear all the proofs and allegations of the parties." We are at a loss to conceive how this decision affects the case before us. There is no pretense of any such misconduct here.

The next case cited is *Field* v. *Oliver*, 43 Mo. 200. For what purpose we are referred to this case we cannot imagine. Anything less in point could not be named. It decides:

1. That it is irregular to withdraw an award from the clerk's office to affix an attestation; and,

2. That where an insolvent plaintiff asks judgment on an award, and is a debtor to the defendant in a liquidated amount, not included in the submission and award, the chancellor has jurisdiction to decree a set-off, or other proper relief.

The last Missouri decision which we are said to have overlooked is *Shelbina Hotel Association* v. *Parker*, 58 Mo. 324. There the plaintiff sought to recover $172 on account of a mistake made by arbitrators. The plaintiff was made aware of the mistake by the arbitrators themselves, soon after they signed the award; nevertheless, he permitted it, without objection, to be confirmed by the court; and, these facts appearing on the face of the petition, the Supreme Court decides that it did not contain facts sufficient to constitute a cause of action.

We see no reason why we should be referred to these cases. They do not touch upon—certainly in no way impair—

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the doctrine uniformly maintained in this State, and asserted in numerous cases cited by us from our reports, that incorrect conclusions of fact, or errors in law, are not enough to vacate an award, and that the Circuit Court cannot interfere unless there be partiality, corruption, gross miscalculation in a matter of figures, or decision in a matter not submitted.

"The question," says Judge Leonard, in *Bridgman* v. *Bridgman*, 23 Mo. 272, "is, not whether the arbitrators, who are the final judges both of the law and the fact, selected by the parties themselves, have erred in their judgment in respect to either, but whether they have been guilty of partiality or corruption, or any other misconduct prejudicial to the rights of the parties, or have failed to make a final, definite, or mutual award, or whether their award was procured by fraud or undue means."

We are also referred to *Hall* v. *Hind*, 12 Man. & G. 851. That case was known to the writer, and apparently was in his mind when he stated, in the opinion filed herein, that awards have been set aside for gross miscalculation in figures. That was a plain case of mistake. It was admitted on the part of Hall that £143 was due from him to Hinds; but the latter claimed a larger sum before the arbitrators, and, after an investigation of the matter in difference, the arbitrators found that a still further sum of £75 was due from Hall. Instead, however, of adding these two sums together, and directing Hall to pay the aggregate sum to Hinds, which would have been £218, the arbitrators, by mistake, deducted the £75 from the £143, and, by a still further mistake, directed by their award that Hinds should pay the difference to Hall. It was a manifest mistake of calculation, and was corrected by the court, and falls within the exceptions to the general rule which we expressly noted. The court, in this, merely amended the award to make it conform to the manifest intention of the arbitrators.

So in another case, cited by Kyd as having been tried in the King's Bench at Hilary term, 1799, the arbitrators

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distributed personal property amongst seven grandchildren, which, by the statute of distribution, belonged in equal moieties to the living daughter and five children of a deceased daughter.

The court swore the arbitrators as to whether they intended to follow the law, and, learning that they did not, said the award must not be disturbed; that where the arbitrators, meaning to follow the law, mistake, it is reason to set aside the award, but where, knowing what the law is, or leaving it entirely out of consideration, they make what they conceive an equitable distribution, it is no objection that it is manifestly against the law. *Ainsley* v. *Goff*, Kyd, 354.

Lord Thurlow says, in *Rice* v. *William*, Brown, 163, if an award remained open to exception, it would seem to be rather a reference than an award.

It was intended in this matter that the whole matter should be referred to arbitrators, to the exclusion of the court.

And Lord Loughborough, in *Morgan* v. *Mather*, 2 Ves. jr. 22, said that if parties litigant consent to substitute arbitrators for a master, they might; but, if they consented to refer the whole matter to judges of their own, he could not correct the error of their judgment on the facts.

A Pennsylvania case is cited by counsel for appellants, but they do not seem to advert to the fact that no case in Pennsylvania can be in point on this question of the power of the court to inquire as to whether there is evidence to support an award, because of the peculiarity of the Pennsylvania statute.

Judge McKean, in *Williams* v. *Craig*, 1 Dall. 338, assimilates an award to the verdict of a jury, as to power to set it aside, but gives as his reason that the Pennsylvania act requires that, to make an award valid, it must be approved by the court. So Judge Washington, in *Hunt* v. *Hunt*—decided in United States Circuit Court of District of Penn-

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sylvania, in 1803—says an award will be set aside for manifest error of law or fact, in Pennsylvania, but says the English rule does not apply there, because the award must be approved by the court.

So that, if appellants complain that this is *dura lex*, we can only reply, *sed lex*. As is said by Chancellor Kent, in *Underhill* v. *Van Cortlandt*, 2 Johns. (N. Y.) Ch. 367, "it is unprecedented to go into the merits of an award; the reasonableness or unreasonableness of it does not affect its validity, so that there was no misbehavior or corruption in the arbitrators."

The law on the subject is fully examined in that case. It is too well settled, both at home and abroad, in fact, to admit of argument.

2. Appellants, however, complain that we overlooked one main ground of error; that the award should have been set aside for misbehavior in the arbitrators, in this, that they heard the argument of plaintiffs in the absence of defendants. It is asserted in the brief of counsel, to quote their language: "It was certainly *partiality*—not moral or corrupt partiality, but legal. It is no longer needful to resort to a proceeding in equity to upset an injustice of this description. These propositions are well considered and well settled in *Knowlton* v. *Mickles*, 29 Barb. 465, and in *Walker* v. *Frobisher*, 6 Ves. jr. 70."

Let us see whether these assertions are well considered. In the case at bar, it appears by the record that defendant had due notice to be present at the argument of the case; that they declined to employ counsel, and did not go themselves. One of the defendants swears that he did not go because he went to a funeral, and that he thinks his co-defendant had the rheumatism. Under the circumstances we do not see that the arbitrators did wrong in proceeding to hear the argument on behalf of the plaintiffs, who did attend.

But what becomes of the statement that it is authorita-

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tively settled by the two cases cited above that such action on the part of the arbitrators is ground for setting aside the award? They are both cases, not of hearing argument after notice, but of taking testimony *ex parte*, without any notice to the opposite side.

In *Knowlton* v. *Mickles* the dispute was about damages caused by a dam. The arbitrators proceeded to examine the premises in dispute, in the absence of the defendant, attended by the plaintiff in person, and listened, then and there, to the statements of at least three persons as to their knowledge of the damage and its cause, and all this without the knowledge of, and in the absence of, defendant. On the authority of *Walker* v. *Frobisher* the award was vacated.

In *Walker* v. *Frobisher* the lord chancellor says that "the arbitrator had examined different witnesses at different times, in the presence of the parties, and recommended them not to produce any more witnesses. To that recommendation they accede. After that he hears three persons, and takes notes of what they said. It does not appear that he had any communication with other parties, and the arbitrator swears it had no effect on his award. I believe him; he is a most respectable man. But a judge must not take upon himself to say whether evidence improperly admitted had no effect upon his mind. The award may have done perfect justice, but, on general principles, it cannot be supported." The chancellor also says that the fact of the arbitrator taking notes at the time showed that it was not a question of mere conversations about the matter in dispute. There is no parallel at all between these two cases and the one before us. The misbehavior was palpable, and no court could hesitate to set aside the award. There is no pretense that the arbitrators in the present case were partial, or prejudiced, or consciously unjust. But it is now claimed that the fact that the evidence does not support the verdict is proof of partiality, in the sense in which the word

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is used as a ground for vacating an award. But this is not the law.

We have gone somewhat at length into this matter because we are sensible of the apparent hardship of the rule in this case. There is nothing whatever in the reasons urged for a rehearing. To use the language of the learned judge in *Lee* v. *Patillo*, 4 Leigh, 443: "If there be anything settled in the law it seems to be this: that, to set aside an award, you must show either a mistake apparent on its face, or misbehavior in the arbitrators. The court may be fully satisfied that the award has operated injustice, yet, if the mistake be not upon its face, and there be no proof of partiality or corruption, it will not touch it."

The application for a rehearing is denied. The other judges concur.

JOHN O. BUTLER, Respondent, *v.* HENRY GAMBS, Administrator of S. W. TOOMER, Appellant.

March 21, 1876.

1. **One who, at the request of the payee and holder of a note, adds his name to those of the original makers in order to induce another to purchase it, is liable to the purchaser in the same manner as if he had been an original maker thereof.**
2. **Mere discontinuance of an advertisement for the sale of real estate under a deed of trust to secure a note is not such a giving of time to the principal debtor as will discharge other makers of the note.**

APPEAL from St. Louis Circuit Court.

Affirmed.

Ellis & Sullivan, for appellant, cited: Rickey *v.* Dameron, 48 Mo. 61; Kuntz *v.* Temple, 48 Mo. 71; Chitty on Bills, 227; Story on Prom. Notes, secs. 121, 133, 467, *n* 3, 474, *n* 2; Herring *v.* Woodhull, 29 Ill. 92; Schmidt *v.*

Schmaelter, 45 Mo. 502; Vane *v.* Richardson, 36 Mo. 130; Cook *v.* Renick, 19 Ill. 598; Ivory *v.* Bank of Missouri, 36 Mo. 475; Turk *v.* Stahl, 53 Mo. 437; Deitz *v.* Corwin, 35 Mo. 376; Merchants' Bank *v.* Easley, 44 Mo. 186; Stagg *v.* Linnerfelser, 59 Mo. 336; Tenny *v.* Prince, 4 Pick. (Mass.) 385; Champion *et al. v.* Griffith, 13 Ohio, 228; Robinson *v.* Abell *et al.*, 17 Ohio, 36; Seymour *v.* Mackey, 15 Ohio St. 515; Union Bank *v.* Willis, 8 Metc. (Mass.) 504; Powell *et al. v.* Thomas, 7 Mo. 441; Albridge *v.* Turner, 1 Gill & J. (Md.) 427; Story on Prom. Notes, secs. 458, 460; Rucker *et al. v.* Robinson *et al.*, 38 Mo. 154; McCune *v.* Belt, 38 Mo. 282; Doyle *v.* Doyle, 97 Mass. 208; Newsam *v.* Finch, 25 Barb. 175; German Savings Bank *v.* Helmrick *et al.*, 57 Mo. 100; Hosea *v.* Rowley, 57 Mo. 357; Hotchkiss *v.* Mosher, 48 N. Y. 478; Hanney *v.* Pell, 3 E. D. Smith (N. Y.), 432; Edw. on Ref. 152; Lewis *v.* Harvey, 18 Mo. 74; Baker *v.* Black, 30 Mo. 225; Beidman *v.* Gray, 35 Mo. 282; Deitz *v.* Corwin, 35 Mo. 376; Buckner *v.* Liebig *et al.*, 38 Mo. 188; Bunce *v.* Beck, 43 Mo. 266; Western Benevolent Assn. *v.* Wolff, 45 Mo. 104; Napper *v.* Blank, 54 Mo. 131; Moies *v.* Bird, 11 Mass. 436; Otto *v.* Bent, 48 Mo. 23.

Slayback & Haeussler, for respondent, cited: Henery *v.* Marsberry, 57 Mo. 399; Miller *v.* Mellier, 59 Mo. 388; Weller *v.* Ranson, 34 Mo. 362; Ferguson *v.* Turner, 7 Mo. 497; Globe Ins. Co. *v.* Carson, 31 Mo. 218; Headlee *v.* Jones, 43 Mo. 235; Nichols *v.* Douglas, 8 Mo. 49; Ford *v.* Beard, 31 Mo. 459; Driskell *v.* Matur, 31 Mo. 325; Hawkins *v.* Redenham, 13 Mo. 125; Hose *v.* Rowley, 57 Mo. 357.

GANTT, P. J., delivered the opinion of the court.

Butler presented for allowance in the St. Louis Probate Court, against the administrator of Toomer, a note of the following tenor:

"$2,000. Six months after date, for value received, we, or either of us, promise to pay to the order of Lewis Hite

$2,000, with interest at the rate of 10 per cent. per annum from date until paid.

[Exhibit A. James Hyatt, N. P.] "B. Ruffner.
"J. L. Ruffner.
"F. Ruffner.
"S. W. Toomer.
(Indorsed as well as signed)—" Lewis Hite."
"February 22, 1867."

On the back of which appears the following credit (it is described in the bill of exceptions under the abbreviation "clk"): "Received, August 24, 1867, on the within, thirteen hundred dollars. J. O. Butler."

The claim was disallowed by the Probate Court. An appeal was taken to the Circuit Court, and the case was referred to Judge Reber, as referee. He filed a report, and on January 22, 1875, it was confirmed by the Circuit Court, giving judgment against the estate of Toomer, in favor of Butler, for the sum of $1,513.25, and 10 per cent. interest, The usual motions were made to set this judgment aside, and this appeal is prosecuted to reverse it.

It appears, by the bill of exceptions, that this note was secured by a deed of trust when originally made. It was originally executed by the three Ruffners only. Three months after its date Hite wished to sell it, and offered it to Butler, who declined to buy unless "the security of other names" were given; whereupon, this fact being explained by Hite to Toomer, he signed the note, which had already been indorsed by Hite, and also signed by him on its face, and the note and deed of trust were then delivered to Butler, who paid value therefor to Hite. Toomer received nothing for signing. He executed the note for the accommodation of Hite, and in compliance with respondent's desire for more security. The sum of $1,300 was paid on August 24, 1867. The note was not protested, and no notice of demand and refusal was given to Toomer. Afterwards, the property being advertised under the deed of

trust, B. Ruffner paid the costs of advertisement, and promised to pay the balance of the note in a short time, and thereupon Butler discontinued the advertisement, and put off the sale. These facts appeared by the report of the referee. The court confirmed the report, notwithstanding the objections of Toomer's administrator, who excepted to it for the following reasons:

1. That it was against the law and the evidence.

2. That the referee refused to give defendant's instructions.

3. Because the conclusions of law announced by the referee are erroneous.

4. Because the referee illegally took the testimony of plaintiff as to what the deceased said. The court overruled these exceptions, and defendant excepted, and appealed to the general term and to this court.

The appellant makes three points before this court. He contends that Toomer signed the note as indorser or guarantor; that he did so without consideration, and, if he was a guarantor, he is, for that reason, not liable; if he was an indorser, he is discharged for want of demand and notice of non-payment when the note matured; and that he was discharged by Butler, the holder, giving time to the principal debtor, Ruffner.

1. The counsel for appellant press these points with great ingenuity and zeal. Their argument is extremely elaborate, and displays great industry as well as acuteness. We are compelled to decide against them, nevertheless. The facts are too strong for them.

Toomer signed the note as joint maker. He consented to do this with a full knowledge of all the facts. He did it with his eyes open, in order to induce Butler to discount the note. He did it at the request of Hite. There can be no doubt that, as between him and Butler, there was a perfectly good and valuable consideration. As to the relation between him and Hite we express no opinion, and are not

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called on to express any. We only refer to these relations because it is plain that what is said in the report of the referee on the subject of there being no consideration for the signature of Toomer refers to a consideration moving from Hite to him.

2. Forasmuch as Toomer was a joint maker of the note, or assumed towards Butler the responsibilities of a joint maker, in order to induce him to discount the note—all of which is undeniable—no question can arise of the necessity of a protest to fix the liability of Toomer. As to him a protest would have been wholly unmeaning.

3. There was no agreement made between Ruffner and Butler by means of which Butler's right of action on the note was suspended for a moment. All that was done was to discontinue an advertisement for the sale of some land conveyed by deed of trust to secure the payment of this note.

4. We find nothing in the testimony of Butler preserved in the bill of exceptions which is liable to the objection urged by appellant. It is proper to say that this point, though among the reasons assigned for setting aside the report of the referee, is not pressed in the argument before us.

The first cases in which the Supreme Court of Missouri had occasion to examine the relations occupied by persons who, after the execution of a note, became parties to it otherwise than as indorsers, were decided in 1842. *Hooper* v. *Pritchard*, 7 Mo. 492; *Powells* v. *Thomas*, 7 Mo. 440. In those cases the Supreme Court of Missouri declared very plainly that any one, not previously a party, signing a note, either on the face or back of it, made himself absolutely liable to pay the contents of the note to the holder. The Supreme Court on that occasion adopted, without reserve, the views entertained by the Supreme Court of Massachusetts on this subject, and even used the language of the last-named court to emphasize its concurrence. *Moies* v. *Bird*,

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11 Mass. 440; *Baker* v. *Briggs*, 8 Pick. (Mass.) 122. It also approved of other authorities to the same effect, cited on that occasion by the counsel for the appellee. The Supreme Court of Missouri then consisted of Judges Tompkins, Scott, and Napton. Ten years later, when it was presided over by Judges Scott, Gamble, and Ryland, similar views were expressed. *Perry* v. *Barret*, 18 Mo. 140. And no dissent from them has since occurred. That court has always held that the relation of parties to a note, to each other and the holder, is to be determined by the character they assume on becoming such parties—to the position they take on the instrument. If a negotiable note be executed by A and B, in favor of C, and then D puts his name, whether on the face or the back of it, D is *prima facie* liable to C as co-maker. It may be shown by evidence that he signed the paper merely at the request, and for the accommodation, of C, in order to facilitate its negotiation. In such case he may be, and naturally would be, only the surety of C. But, to any one taking the paper thus signed upon the faith of his signature, he would be liable as maker. Stress has been laid, in this case, on the fact that Toomer signed this note three months after it was executed by Ruffner. So far as Toomer's obligation to Butler was concerned, we think this circumstance gives point and distinctness to it. It may be said, with all strictness, that Toomer requested Butler to discount this paper for his friend Hite; and, to induce him to comply with the request, consented to, and did, sign the note as co-maker of it. He thus consented to assume all the liabilities which had already been incurred by the other makers towards any one who, after his signature, secured the note from Hite by indorsement. It was entirely competent for Toomer to make such a contract. It rested upon a full and valuable consideration. He is shown to have made it. There is no conceivable reason why he should not be held to it.

The Supreme Court of Missouri has refused to permit

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parties who, for the accommodation of any party to a note, have signed the same as successive indorsers, to change the relations between the successive accommodation indorsers, by the suggestion that they are all sureties, and, therefore, liable as among themselves to contribution. *McCune* v. *Belt*, 45 Mo. 174. Of course, if any special contract be shown as to the relations to be occupied towards each other by the maker and indorsers of a promissory note, or the drawer, acceptors, and indorsers of a bill of exchange, effect will be given to such contract. But, in the meantime, they are all liable to third persons, according to the tenor of the commercial instrument they have signed. In the case before us, the simplicity and clearness of the proof on these heads leave nothing to be desired.

The judgment of the Circuit Court is affirmed, all the judges concurring.

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J. H. TODD *et al.*, Appellants, *v.* GERMANIA FIRE INSURANCE COMPANY, Respondent.

March 21, 1876.

Plaintiffs sued on a fire policy insuring the stock of a commission merchant which might be on hand in a certain warehouse at any time during a fixed period. The petition alleged that a lot of buffalo meat belonging to the holder of the policy was destroyed by fire during the period designated, but failed to show that it was in the warehouse mentioned in the policy. *Held*, bad on demurrer, as not stating facts sufficient to constitute a cause of action.

APPEAL from St. Louis Circuit Court.

Affirmed.

Fisher & Rowell, for appellants, cited: 1 Pars. on Mar. Ins. 45; 2 Pars. on Mar. Ins. 442; Ph. on Ins., sec. 412; 2 Pars. on Con. 442; Wise *v.* St. Louis Ins. Co., 23 Mo. 84; De Forrest *v.* Fulton Ins. Co., 1 Hall (N. Y.), 84–135;

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Walters *v.* Monarch Life Ins. Co., 34 Eng. Law & Eq. 116; Kearney *v.* Sunderland Ins. Co., 6 Eng. Law & Eq. 312; Farrow *v.* Commercial Ins. Co., 18 Pick. (Mass.) 53; Griffin *v.* Pugh, 44 Mo. 328; Meigs *v.* Lowell, 10 Mo. 538; Day *v.* Patterson, 18 Ind. 114; Bird *v.* Lewis, 7 Ind. 615; Cloud *v.* Norman, 18 Ind. 44; Marchington *v.* Vernon, 1 B. & P. 101; Hall *v.* Marston, 7 Mass. 575; Sargeant *v.* Morris, 3 B. & A. 276; Ruan *v.* Gardner, 1 Wash. 145; Maryland Ins. Co. *v.* Graham, 4 Har. & J. (Md.) 62; Skurver *v.* Stocks, 4 B. & A. 437; Felton *v.* Dickinson, 10 Mass. 287.

O. S. Baker, for respondent.

GANTT, P. J., delivered the opinion of the court.

The Germania Fire Insurance Company issued, on December 7, 1872, to Rich & Swansey, commission merchants in St. Louis, Missouri, a policy of insurance on a stock of produce, their own, held by them in trust on consignment, or sold but not delivered, contained in the second story of the four-story brick building situated and known as No. 312 North Commercial street, St. Louis, Missouri, to an amount not exceeding $1,000.

This policy was, with consent of the defendant, assigned to Rich & Co. The petition states further that, in January, 1873, the firm of Todd & Co. sent to Rich & Co. a lot of buffalo meat; that this was forwarded to Rich & Co. to be sold by them as the factors of the plaintiffs; that they received said property and held the same as commission merchants; and that while they so held it, to wit, on January 11, 1873, a fire occurred, by which the said property was totally destroyed. Notice was given, proof of loss made, and, no payment being made, this suit was brought.

The defendant demurred, assigning as reasons for the demurrer:

1. That the petition did not state facts sufficient to constitute a cause of action.

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2. That there is a defect of parties, and that Rich & Co. should have been the plaintiffs.

3. That Todd & Co. have no legal capacity to sue, as no interest in the contract of insurance shown vested in them.

The Circuit Court, at special term, sustained the demurrer. The plaintiffs appealed to the general term, which affirmed the judgment, and the case comes here by appeal.

The case was argued before us by the counsel for the appellants, but the respondent did not appear. It was argued as if the only objection raised by the record was that the action was not in the name of the insured or his assignee. We are of opinion that there is another, and, as we view it, an entirely fatal objection to the case made by the petition. The property is insured as a "stock of produce, their own, held by them in trust on consignment, or sold but not delivered, contained in the second story of the four-story building situated and known as No. 312 North Commercial street, St. Louis, Missouri." What is the meaning of this description? If it were not that the terms "stock, produce, etc.," imply that the insured was engaged in a business which required the keeping up of stock to some standard, these words would signify that a quantity of existing merchandise, stored at a particular place, was the subject of insurance. If, instead of being a stock of goods the composition of which may, and probably will, vary from day to day, and in reference to the changing nature of which both parties contracted, it were a quantity of furniture or fixtures, or a library, the fair construction would be that any articles added to the mass after the effecting of the insurance were not included in the risk. One element of the description, however, appears unmistakable. It was intended by the underwriter to insure certain chattels at No. 312 North Commercial street, St. Louis, Missouri. There can be no doubt that the exposure of this house to destruction by fire was the risk he undertook; and that the removal of the property to another spot would

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determine the insurance. Equally plain it is that no stock which, from time to time, might be added to that existing when the insurance was effected would be covered by this policy until it reached this building. If the assured had received notice of a consignment of great value, and it had arrived at St. Louis, but while on the wharf, before reaching his store-house, had been consumed by fire, no one would have dreamed that he had, in respect of it, a claim against the company which issued this policy. Such indemnity must be secured by an instrument of a very different nature.

It is quite consistent with the petition in this case that the buffalo meat, for the loss of which this action is brought, was destroyed by fire in some other building than No. 312 North Commercial street. It does not anywhere appear in the petition that the buffalo meat came to No. 312 North Commercial street, or that this building had been visited by fire. All this should exist, and should appear by the petition, or else it fails to state facts sufficient to constitute a cause of action. The closest approximation to such an averment is that the buffalo meat was shipped to, and came to the possession of, Rich & Co. This may be quite true, without any resulting liability on the part of the Germania Insurance Company.

We do not feel inclined to go further. We see already enough to compel the affirmance of the judgment; and that, as we understand it, disposes of the case. All the judges concurring, the judgment of the Circuit Court is affirmed.

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Joseph Mulhall, Appellant, *v.* Stephen L. Cheatham *et al.*, Respondents.

March 21, 1876.

One partner cannot sue another at law respecting a matter arising out of an unsettled partnership account.

Appeal from St. Louis Circuit Court.

Affirmed.

H. B. O'Reilly, for appellant, cited: Moffatt *v.* Conklin, 35 Mo. 453; Camp *v.* Hulan, 43 Mo. 591; Wag. Stat. 1040, sec. 11; 3 Kent's Com. (10th ed.) 27; Freeman *v.* Bloomfield, 43 Mo. 391.

Irwin Z. Smith, for respondents.

Gantt, P. J., delivered the opinion of the court.

Mulhall sued Cheatham and Kelly to the February term, 1873, of the St. Louis Circuit Court (charging them as copartners under the name of S. L. Cheatham), for the sum of $1,816.25, the balance due him of cash advances, upon the order and at the request of defendants, upon shipments of stock, made and consigned by defendants to plaintiff, within the last three months, as will more fully appear by the itemized account thereof filed with the petition.

Annexed to the petition is an account between S. L. Cheatham and Mulhall, commencing on November 12, 1872, and closing on January 9, 1873, showing a balance to the credit of Mulhall of $1,816.25.

The defendants answered that they were partners, and that Mulhall was a member of the firm; that the object of the partnership was the purchase and sale of hogs and other live stock; that no written articles were executed, but it was agreed that Mulhall was to furnish money to defendants to purchase hogs and stock; the hogs and stock were to be shipped to St. Louis, to Mulhall, who was to receive and sell them on account of the firm—Mulhall to receive

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half the profits and sustain half the losses of the enterprise. All the moneys so advanced by Mulhall were on account of the partnership, and were used for its purposes. Defendants deny that they are indebted to plaintiff in the sum of $1,816.25, or at all, but all the money mentioned in his account was his contribution to the said firm; that, on settlement, he would be entitled to the sum of $17,301.75, but that he received a much larger sum than is stated in his bill of items, the amount so by him received being in fact $15,690.40; that defendants expended large sums of money on the purchase and shipment of hogs, to wit, $18,001.14, and that they received, as the funds of said firm, the sum of $17,300, which is the sum Mulhall claims to have advanced to them; that the affairs of said partnership have not been settled, and cannot be settled in this proceeding; that, upon a settlement, Mulhall is chargeable with more than $15,690.40, because he pretended to sell lots of hogs to sundry persons, at low figures, less than their true and market value, and credited the firm only with such depreciated value, whereas he was, in truth, the purchaser of such lots, and resold them at large profits; that Mulhall has withheld the account of these transactions from defendants. The defendants filed with their answer an account of their expenditures for said firm, and asked for judgment and costs. This account showed hogs purchased amounting to $17,250.79, expenses, $558.90 plus $4.50; then, in addition, a further purchase amounting to $255.85, and $500 paid to Mulhall—total, $18,001.14.

Mulhall replied that he was not a member of the firm of S. L. Cheatham, or any other firm of which defendants were partners. He denied that he ever entered into articles of partnership with defendants, or either of them. He denied that defendants ever purchased hogs or other stock on account of said pretended firm, and shipped them to St. Louis; denied that he was to receive or did receive

at St. Louis any such stock, or was to sell or did sell any such stock, as stated in the answer. He denied that the sums of money advanced by him were advanced on account of any such pretended partnership; and he denied in detail all the particular allegations made in the answer in this connection.

There was a trial, and the jury found for the defendants.

By the bill of exceptions a mass of evidence appeared, of which only the following need be quoted for the purpose of this decision:

"S. L. Cheatham testified that he resided in Lafayette county, Missouri; that in November, 1872, he brought a lot of stock here; met Mulhall, and he agreed to furnish Cheatham with the money wherewith Cheatham would buy hogs, send them to St. Louis to Mulhall for sale, and they would divide the profits and losses. They agreed to act as partners. This was November 2, 1872. The letter was produced, and was dated St. Louis, November 2, 1872, directed to Mr. Hall, banker, Lexington, Missouri, informing him that S. L. Cheatham was going to buy hogs for Mulhall, who would accept his sight drafts from time to time. Cheatham told Mulhall that he and Kelly were trading together. Kelly and Cheatham bought hogs and shipped them. The drafts were drawn in the name of S. L. Cheatham.

Kelly, who was examined, said that all he knew of the partnership was what he learned from Cheatham.

Mulhall testified that he had known Cheatham many years; that in November, 1872, he agreed to furnish him money to buy hogs; had entire confidence in Cheatham; never agreed to go into partnership with him; the idea of partnership never entered into witness' head; had no recollection of Cheatham mentioning Kelly's name. Kelly, in January, declared that he was partner of Cheatham. Witness never inquired of Cheatham as to the expenses incident to the

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purchasing of hogs at any time; kept Cheatham posted as to the markets so that he could purchase hogs judiciously. In December, Cheatham asked witness for $500 to buy sheep; witness consented; after he came down, there was a balance due witness, and Cheatham asked to be allowed to retain it until his cattle fattened; witness consented. This was all the evidence that was relevant to the issue tried.

The court instructed the jury as follows, for the defendants:

"The jury are instructed that, if they believe from the evidence that plaintiff entered into an agreement or arrangement by which plaintiff, Mulhall, was to furnish money for the purchase of hogs, and that defendant Cheatham, or defendants Cheatham and Kelly, were to purchase the hogs and to ship them to plaintiff at St. Louis, and the plaintiff was to sell them, and that the profits or losses growing out of the transaction were to be divided, one-half to plaintiff, Mulhall, the other half to S. L. Cheatham, or to defendants Cheatham and Kelly; that the money advanced by plaintiff, and the hogs purchased and shipped by defendants, were done under and in pursuance of such agreement or arrangement, then such agreement and arrangement constituted a copartnership, and plaintiff cannot recover in this action, and the jury must find for defendants."

Plaintiff excepted to the giving of this instruction.

Plaintiff then asked, and the court refused, the following instructions, plaintiff excepting to the refusal:

"The jury are instructed that, unless the jury believe from evidence that Mulhall knew that Mr. James Kelly was to be his partner, and consented thereto, then they will find for the plaintiff the amount claimed in his petition."

"The jury are instructed that Mr. Mulhall cannot be charged as a partner with James Kelly and Stephen L. Cheatham, or either of them, without his knowledge or consent."

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"Unless the jury believe from the evidence that both Cheatham and Kelly were partners with Mr. Mulhall, then they will find for the plaintiff."

The court then, of its own motion, gave the following instruction, plaintiff excepting:

"The issue which the jury has to try is whether the account sued on grew out of partnership transaction or not. And the court instructs the jury that, unless they believe from the evidence that plaintiff agreed with Cheatham to buy the hogs on joint account with him, or with him and Kelly, and divide the profits, or losses, as the case might be, they will find for the plaintiff the amount claimed, with interest at the rate of 6 per cent. from date of suit."

The jury found for defendants on May 16, 1873, and on May 19, 1873, plaintiff filed a motion for a new trial, assigning for reasons:

1. That the verdict was against evidence.
2. Because the jury disregarded the law and the evidence.
3. Because the court refused proper instructions asked by plaintiff.
4. Because the court gave improper instructions to the jury at the request of defendant and of its own motion.
5. Because the court permitted improper evidence to be given.
6. Because the court excluded proper evidence.
7. Because the court, on motion, refused to strike out irrelevant and redundant matter from the answer.

The court overruled the motion. Plaintiff excepted, and moved for a rehearing of the motion for a new trial; the court overruled that motion, and plaintiff excepted. The general term affirmed the judgment of the special term, and the plaintiff appealed to the Supreme Court, whence the cause was transferred to the St. Louis Court of Appeals.

1. Plaintiff sued defendants for the balance of cash advances. Defendants answered that they were partners of

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plaintiff; that they had had transactions as such, and that they had paid out in the business upwards of $18,000; that the affairs of the partnership were unsettled, and could not be settled in this suit. Plaintiff replied, denying the partnership. The instructions given by the court, of its own motion, stated the issue neatly, and deduced the law as favorably for the plaintiff as he could under any circumstances claim. The instructions asked by the defendants, and given, were substantially the same. Both were unexceptionable expositions of the law applicable to the facts of this case.

2. The instructions asked by plaintiff were properly refused. From the first and second it seemed to be the idea of the plaintiff that, if he were not aware of the legal consequences of his acts, then those legal consequences would not attach; that, if he ignorantly entered into certain relations with the defendants, without a correct idea of the legal consequences of what he did, then those natural legal consequences were suspended. This surely cannot be seriously contended for.

The third instruction asked by plaintiff, and refused, declared that, unless both Cheatham and Kelly were partners of Mulhall, the jury must find for plaintiff.

Now, Mulhall had sued them both; obviously they both stood in the same relation to him, or else Kelly was not in any relation to him at all. Unless Kelly was a partner of S. L. Cheatham, and was comprehended in the firm known as "S. L. Cheatham," he was not answerable to Mulhall in any respect. Suppose the jury were of the opinion that Mulhall and Cheatham were partners and that Kelly was not connected with Cheatham; it would follow that, in any action touching these accounts between Mulhall and Cheatham, Kelly must be left out—having no connection with the matter—and that, Mulhall and Cheatham being partners, the one could not sue the other at law for a partnership transaction until the partnership accounts had been adjusted. To deduce from the establishment of a partnership between

Mulhall and Cheatham, to which Kelly was no party, a liability on the part of Kelly to one of the partners in respect of a matter in which he could only be involved by virtue of being the partner which he was declared not to be, is very inconsequent. The court ruled correctly when it refused these instructions.

The judgment is affirmed, all the judges concurring.

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JOHN H. TRORLICHT, Appellant, *v.* HELENA WEIZENECKER, Respondent.

March 21, 1876.

1. A *donatio mortis causa*, consummated by delivery, conveys to the donee the legal title to the money or property given, for the purposes indicated by the donor; and such legal title will be enforced by courts of justice.
2. If such money or property passes into the hands of a donee, charged with a trust, and he promises the beneficiary to perform the trust, performance of such promise may be compelled by suit at law. If no such promise be made, performance of the trust may be enforced in equity.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Reber, with *H. N. Hart*, for appellant, cited: 2 Story Eq. Jur., secs. 1041, 1046; Harris *v.* Clark, 3 Comst. (N. Y.) 93; Constant *v.* Tyler, 1 Paige (N. Y.) Ch. 316.

Andrew Auer, for respondent, cited: 2 Bla. Com., secs. 441, 514; Toll *v.* Hilbert, 4 Br. 291; Miller *v.* Miller, 3 Wms. 357.

GANTT, P. J., delivered the opinion of the court.

Trorlicht sued Helena Weizenecker, alleging that she was the widow, and he the son-in-law, of Peter Weizenecker; that he has children of his deceased wife and himself now living; that Peter died on January 29, 1869; that, shortly before his death, Peter drew his check against money then by him held in the Central Savings Bank, of St. Louis, in the sum of at least $1,200, in favor of Francis Fisher,

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with instructions to Fisher to draw the money and hand it to defendant, upon condition that she would pay $1,200 of it to plaintiff, for the purpose of supporting and maintaining his children, the issue of Peter's daughter; that Peter made known the giving of this check, and the intentions for which it was designed, to defendant; that defendant received the money and promised to pay it to plaintiff for the purposes aforesaid, but afterwards refused to pay it to him. Wherefore he sued, setting forth the aforegoing facts, and asking for judgment.

The court sustained a demurrer to this petition, and plaintiff appealed to this court.

1. We think the Circuit Court erred. The rule of law is that, if money or property be delivered to A for the use of B, or to be paid or delivered to B, the acceptance of the money or property by A amounts to an express promise from the bailee to the bailor to pay or deliver the money or the property accordingly; and that the person to whom the ultimate use of the money or property is designed may sue the bailee therefor *at law*—especially if the bailee recognizes his obligation to such person, and promises to pay or deliver the money or property to him; and, without such promise, such person may sue the bailee in equity. See 2 Story Eq. Jur., sec. 1041, where the authorities on this head are collected.

2. It is also settled law that, when a gift is made of money or property to any one *causa mortis*, and the money or property is delivered, the donee has a legal title to the money or property for the purposes indicated by the donor. Delivery is essential; that is, the property or money must pass from the hands or custody of the moribund.

But whether it passes to the possession of the party to be ultimately benefited, or to some bailee for his use, seems, as we might naturally expect, to be immaterial.

In New York it has been held that an assignment of a fund in the hands of a third person would be good as *donatio*

mortis causa. Harris v. *Clark*, 2 Barb. 94; *Contant* v. *Schuyler*, 1 Paige, 318.

In *Wright* v. *Wright*, 1 Cow. 598, it was decided that a promissory note, executed by the testator in his last sickness, and delivered without consideration to the payee, in expectation of death, and intended as a gift, was a valid *donatio mortis causa*, and that an action lay against his executor.

But there is no occasion to pursue this subject. In the case at bar, the money intended by the deceased was delivered to Fisher. There is no doubt but that he got it and handed it to defendant. If she received it for the use of plaintiff, and promised to pay it to him accordingly, she is answerable to him at law; and if she did not so promise, she is at any rate answerable in equity. 2 Story Eq. Jur., sec. 1041. The judgment of the Circuit Court must be reversed and the cause remanded.

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CHARLES MUNTER, Respondent, *v.* JULIA BANDE *et al.*, Appellants.

March 21, 1876.

1. An action for personal trespass is properly brought against both husband and wife, when committed by the wife.
2. Where it is proved that the defendant intentionally threw vitriol upon the plaintiff, a verdict of $1,000 will not be considered excessive, however little the plaintiff may have been injured thereby. It is a case for punitive damages.

APPEAL from St. Louis Circuit Court.

Affirmed, with 10 per cent. damages.

F. & E. L. Gottschalk, for appellants, cited: Green *v.* Craig, 44 Mo. 90; Fredersheit *v.* Edmondson, 36 Mo. 226; McKerr *v.* Citizens' Ry. Co., 42 Mo. 79; Martin *v.* Robson, 65 Ill. 129; Daily *v.* Houston, 58 Mo. 361; Boul-

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lard v. Calhoun, 13 La. An. 445; Crocker v. Chicago & Northwestern R. R. Co., 36 Wis. 676; Perkins v. Missouri, Kansas & Texas R. R. Co., 55 Mo. 201; Caldwell v. Stephens, 57 Mo. 589; Long v. Corkwell, 55 Mo. 93; Higgins v. Peltzer, 49 Mo. 152; Walser v. Shies, 56 Mo. 89; Goetz v. Autz, 22 Mo. 170.

Finkelnburg & Rassieur, for respondents, cited: Bishop's Mar. Wom., sec. 905 (ed. 1871); 2 Hill. on Torts, 503, sec. 6, and p. 506, sec. 8 (4th ed.); 2 Kent's Com. 149 (12th ed.); Baker v. Young, 44 Ill. 42; Matthews v. Fiestel, 2 E. D. Smith (N. Y.), 90; Smith v. Taylor, 11 Ga. 20; Anderson v. Hill, 53 Barb. 238; Reeve's Dom. Rel. 149 (ed. of 1862); Dailey v. Houston, 58 Mo. 361; Goetz v. Ambs, 27 Mo. 33; Green v. Craig, 47 Mo. 90; Perkins v. Missouri, Kansas & Texas R. R. Co., 55 Mo. 201; Franz v. Hilterbrand, 45 Mo. 121; Buckley v. Knapp, 48 Mo. 153; Clements v. Maloney, 55 Mo. 352; Schouler on Dom. Rel., side page 104 (2d ed.); Austin v. Wilson, 4 Cush. (Mass.); Walser v. Thies, 56 Mo. 89; 1 Bishop's Mar. Wom., sec. 907 (ed. 1871); 2 Hill. on Torts (4th ed.) 505.

GANTT, P. J., delivered the opinion of the court.

The petition set forth that the plaintiff, on May 11, 1874, was burnt and his clothes injured by vitriol thrown upon him maliciously by Julia Bande, wife of John Bande. The defendants filed an answer of the form to which we have already several times called the attention of the bar. It consisted of a reproduction of the petition, with negative averments. Such a mode of pleading is very liable to involve the defendant in the meshes of a negative pregnant, and leads, at best, to an unnecessary prolix style of answering. The recent act, permitting a general denial, will, perhaps, prevent its recurrence.

At the trial the plaintiff testified, and proved the infliction of the injury complained of. He was standing, at the time, in front of the house of defendants, in quiet conversation

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with some other persons. He felt the fall of the vitriol on his person, and, glancing up, saw a hand and a porcelain dish in the act of drawing back from the window of the second story of defendants' house. He had been in business with defendant John Bande; they had disagreed and parted, and plaintiff had set up a rival house of his own in the neighborhood.

Johanna Schiller, a witness for plaintiff, testified that she boarded opposite to the house from which the fluid was thrown on plaintiff; that on May 11, 1874, she was at her window and saw Julia Bande look out of her window, then take a small bottle and pour some fluid into a soap-dish, throw it out on defendant, and then retire into the room; that she knew Julia Bande very well, and recognized her in court.

One of the persons standing with plaintiff on the street, at the time of the occurrence, corroborated his statement as to the circumstances. This was all the evidence on the part of plaintiff.

Defendant examined several witnesses, whose testimony tended to show that Julia Bande was not up stairs during the entire morning of the day of the alleged outrage, but was in the bar-room below until half-past eleven o'clock. Julia Bande herself was examined, and denied that she threw any vitriol on plaintiff, and denied the statements of Johanna Schiller in every particular. A witness was examined, on the part of defendants, who said that Johanna Schiller "set his boarders by the ear and did not pay her board, and, as far as he knew, she told more stories than truth." This was all the evidence.

The court instructed the jury, at the instance of the plaintiff, as follows:

"If the jury believe from the evidence that the defendant Julia Bande intentionally cast vitriol, or other corrosive chemical substance, upon plaintiff's person, then the jury will find for plaintiff."

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"If the jury find for the plaintiff, and they further find that the act complained of was maliciously done, the jury, besides compensating for the injury sustained, may award such further exemplary and punitive damages as, under all the circumstances of the case, the jury may deem proper, not exceeding the sum of $5,000."

The defendants excepted to the giving of these instructions, and asked the following, the first of which the court gave, and refused the other two, defendants excepting:

1. "The court instructs the jury that it is incumbent on plaintiff to prove to the satisfaction of the jury that defendant's wife did the acts complained of."

2. "The court instructs the jury that if, from all the evidence in this cause, the jury have a reasonable doubt of the guilt of the defendant Julia, then the jury must find a verdict for the defendant."

3. "The court instructs the jury that there is no evidence of any damage sustained by plaintiff, and even if the jury find for plaintiff, they cannot give more than nominal damages."

The jury found for the plaintiff, with $1,000 damages.

The defendant filed a motion for a new trial, assigning as reasons therefor:

1. That the verdict is against evidence.
2. That the damages are excessive.
3. Because the court erred in not admitting proof of the general character of one of plaintiff's witnesses.
4. Because the court refused defendants' instructions
5. Because the court gave plaintiff's instructions.
6. Because the verdict is insufficient to render a judgment upon.
7. Because the court erred in admitting improper evidence for plaintiff, and excluding proper evidence for defendants.
8. Because defendants were surprised at the trial by the evidence of plaintiff and his witnesses.

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Defendants also filed a motion in arrest of judgment, for the reasons:

1. That the verdict is insufficient and indefinite.
2. Because the judgment rendered is erroneous and unauthorized by the verdict.
3. Because the judgment is against a married woman.
4. Because the judgment is against husband and wife jointly.

The verdict was in the following words:

"We, the jury in the case of Munter *v.* Bande, find verdict for plaintiff, and assess the damages at one thousand dollars ($1,000). WM. GANELS, *Foreman*."

The record entry of the judgment is as follows:

"*Charles Munter* v. *Julia Bande and John Bande, her husband.* Tuesday, January 19, 1875. Now at this day come said parties by their respective attorneys, and thereupon come also a jury, &c., &c., who, * * * upon their oaths aforesaid, find the issues joined in favor of said plaintiff, and assess his damages at the sum of one thousand dollars. It is therefore considered by the court that said plaintiff recover of said defendants the sum aforesaid, in form aforesaid as assessed, and his costs and charges herein expended, and have thereof execution."

The Circuit Court at special term overruled both motions, the defendants appealed to the general term, and, the judgment being affirmed, the case is before us on appeal.

1. There is no error in the record. The evidence was ample to warrant the verdict; the court excluded no evidence which the defendants wished to give; it admitted no evidence against defendants' exception, or even objection; and there is no hint or suggestion in the record that defendants were surprised, except that it is so stated in the motion for a new trial. But the statement is utterly without support, and, as far as we can see, is meaningless. We can hardly conceive the possibility of a real surprise in this case, except in respect of the testimony of Johanna Schil-

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ler; and this reason not only is not sustained as to her, but defendants furnish evidence that they expected her to testify as she did. They were prepared with witnesses to impeach her character, and this evidence was given to the jury without objection. Plaintiff did object in the first instance, and then withdrew his objection.

The trespass was committed by the wife alone, and the action was properly brought against the husband and wife. This is perfectly settled as the correct course; and one of the cases cited by defendant, to disprove the position, is a strong authority in its support. *Dailey* v. *Houston*, 58 Mo. 361. The matter is too familiar to the profession to need the citation of authorities. The counsel for respondent has furnished a list which, while we approve, we do not reproduce.

2. The only point we will dwell on is the amount of damages. The defendants think these excessive. We pause on the matter merely to emphasize our dissent from this idea. We can hardly say what damages, in such a case, we would think excessive. The dastardly, vindictive, malevolent, and, as we hope, un-American practice of vitriol throwing should meet with no mercy at the hands of a jury. We presume the moderation (for such we esteem it) of the present verdict is due to causes not disclosed, such as the pecuniary circumstances of the defendants. There is no mode of inflicting injury more likely to result, without warning, in the destruction of the organs of sight, or the branding of an indelible disfigurement on the person. It ranks among personal trespasses as murder by poison among less ignoble modes of homicide.

The record in this case is so free from all grounds of colorable exception that we reach the conclusion that the appeal was taken mainly, or entirely, for delay, and order the judgment of the Circuit Court to be affirmed, with 10 per cent. damages. All the judges concur.

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The State, *ex rel.* John S. Ganzhorn, Appellant, *v.* Walter C. Carr, Auditor, etc., Respondent.

March 21, 1876.

Under the city charter of 1870, an ordinance which had passed the council and been presented to the mayor for approval, but neither approved by him nor returned, did not become a law when the council adjourned *sine die* before the expiration of the ten days allowed by law for the return of such ordinance by the mayor.

Appeal from St. Louis Criminal Court.

Affirmed.

H. B. Lighthizer, for appellant, cited: 1 Story on Con., sec. 891; Pike *v.* Megouin, 44 Mo. 491, 499.

Leverett Bell, for respondent, cited: Fowler *v.* Pierce, 2 Cal. 172; People *v.* Hatch, 19 Ill. 283.

Bakewell, J., delivered the opinion of the court.

The petition in this cause alleges that, on March 22, 1870, ordinance 440 was passed by the city council, and was signed by the president of that body and forwarded to the mayor for his approval; and that the council adjourned within ten days after the passage of said ordinance, and the mayor neither approved nor returned said ordinance, but that the same became a law under the provisions of Article 3 of the charter of the city of St. Louis, approved March 4, 1870, and that said ordinance 440 directed the auditor to draw his warrant on the treasurer, in favor of the relator, for the amount of $5,108.91. The petition prays that a writ of *mandamus* issue, commanding respondent, Walter C. Carr, auditor of said city, to audit and allow said claim, and to issue a warrant in favor of plaintiff's relator for that sum.

The respondent, in his return to the writ, denies that any ordinance, authorizing him to audit the claim of relator, had been passed so as to become a valid ordinance under the charter of the city. To this return relator replies that

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ordinance 440 became a law because the council adjourned within ten days after its passage, and the mayor neither approved the same nor returned it to the council with his disapproval.

Upon motion of respondent, the reply was stricken out, and, relator declining to plead further, there was a final judgment of dismissal, from which the relator appealed to general term, where the judgment being affirmed, he appeals to this court.

The question presented on the record for the determination of this court is whether, under the charter of the city of St. Louis of March 4, 1870, an ordinance which had passed the council and been presented to the mayor for his approval, but not approved by the mayor, nor returned with his objections to the council, becomes a law when the council adjourns without a day before the expiration of ten days from the date of such presentation to the mayor.

Section 2 of Article 3 of the charter of March 4, 1870, is in these words: "Every ordinance, before it shall become a law, must be signed by the president of the city council and presented to the mayor for his approval; if he approves the bill, he shall sign it; if not, he shall return it, with his objections, to the city council, which objections shall be entered at large upon the journal, and the bill be reconsidered; after such reconsideration, the yeas and nays shall be called and recorded, and, if two-thirds of all members elected to the city council shall vote for the bill, it shall become a law; but if any bill shall not be returned by the mayor within ten days (Sundays excepted) after it shall have been presented to him for his approbation, the same shall become a law in the same manner as if he had approved and signed it."

This question presents some difficulty after all is said that can be said upon it. Either of the two possible views of it will be found so supported by reason that a resolution of the doubt completely satisfactory, in the sense that it

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will carry conviction to every unprejudiced mind, cannot, perhaps, be hoped.

No such question can arise under the existing charter of the city of St. Louis, for the Legislature, by an amendatory act, approved March 18, 1875, has provided that, if the council by adjournment prevent the return of the bill within ten days, it shall not be a law.

The Constitution of the United States provides (Art. 1, sec. 7) that: "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law in like manner as if he had signed it, unless Congress by their adjournment prevent its return, in which case it shall not be a law."

Judge Story (Com. 1, sec. 891), commenting on this clause of the Constitution, says that, but for the express prohibition, Congress, by adjournment before the expiration of the ten days, could deprive the President of his veto. He, therefore, is an authority for saying that the true interpretation of the clause in the charter now under consideration is that, where an adjournment takes place before the expiration of the ten days, without a return of the ordinance, it becomes a law. Had the question before Judge Story been a practical one, we should be disposed to give the very greatest weight to the authority of this great name. But Judge Story is speaking of a mere hypothesis, which probably did not occur to him as likely to become a fact, and it is to be presumed, therefore, that he gave to the matter no very grave consideration. His view as to what might have been the consequence had the concluding clause of this section been omitted is interesting, and would be in the highest degree important had he been called upon, as we are, to interpret an existing law, to determine the rights and duties of individuals, or, in any degree, to establish a rule of conduct. Unfortunately for the decision of this controversy, that was not the case;

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and the remark of Story is, aside from his main purpose, the *dictum* of a writer of a treatise—a *dictum* which he himself, probably, would have been the last to wish to see invoked as decisive of a question of practical importance.

It is argued that the fact of the recent amendment, to which we have referred above, should be taken as a legislative interpretation of the law, and a declaration that as it stood originally, without the added clause, an ordinance not returned within ten days became a law by the adjournment of the council. But, independently of the fact that the views of the Legislature as to the meaning of an existing law are no aid to its judicial interpretation, this is an argument that may be invoked by either side.

It may be said that the Legislature had no intention, by this amendment, to change the law, but merely to settle its meaning in the sense in which it had always been practically understood and acted upon, and to make that clear which had been ambiguous before.

It is plain that the mayor is not the mere executive officer of the city; he has, under the charter, a certain real participation in the making of its laws. He is to have ten days within which to deliberate whether he will approve an ordinance or not.

If he returns it with his veto and his reasons, it may still be passed, after reconsideration, and by an increased vote; if he retains it beyond ten days, without communicating in regard to it with the legislative department proper of the city government, it becomes a law, and he cannot, therefore, defeat the will of the majority of the council by mere inaction. But why should the council have the power to deprive him of the time of deliberation given him by the charter, and to pass a law without his concurrence, and perhaps against his will, by a bare majority, merely because the law is introduced towards the close of the session?

We can see no good reason for such a rule, and we do not believe that such was the meaning of the act.

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It is true the law says in express terms that "if any bill be not returned by the mayor, within ten days after it shall have been presented to him for his approbation, it shall become a law," but it is thought that those ten days must be days during which the council is in session, so as to make it possible to return the bill—the power of the mayor to act, either favorably or adversely to the bill, being taken away by the adjournment of the council. This adjournment of the council was its own voluntary act. The mayor could not control it, and if the fact of its adjournment causes the enactment of all ordinances then pending before the mayor and awaiting his sanction or veto, then it was in the power of the council to pass all such ordinances, not only without the coöperation of the mayor, but in spite of his opposition, and that without a two-thirds vote, and without having brought before it the grave reasons which the experience of the chief magistrate of the city might have suggested against any particular measure thus inconsiderately passed.

The evils of hasty legislation are apparent, and the courts will be unwilling, by construction, to sanction these evils or add to the opportunities for their recurrence. If the Legislature meant to give to the city council a power to pass laws introduced nine days before adjournment, which it did not possess as to any bills introduced at an earlier period of the session, it would probably have said so in express terms. There seems to be no good reason for such a variation from the principle that the concurrence of the mayor, or a consideration of his reasons for his non-concurrence, followed by a vote of two-thirds of the council, should be necessary to the passage of an ordinance.

Many reasons suggest themselves at once against any such arbitrary diminution of the sanctions confessedly requisite for the validity of all enactments passed before the closing days of the session.

So far as we know, all express legislation on the subject

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sanctions the rule that the approval of the chief magistrate, president, governor, or mayor, as the case may be, is essential to every law not reconsidered and passed by a renewed and increased vote over his veto. And though the law, as it stood when the ordinance before us was passed, in express words declared that a bill not returned in ten days shall become a law, and contained no express provision as to the effect of an adjournment before the expiration of the time given to the mayor for deliberation, we think that the ten days meant are days during which the council is in session, and that the law as it now reads, and the law in force on March 23, 1870, were intended to have the same effect. We think that the ordinance, having been in the hands of the mayor, unapproved, for less than ten days, expired with the session of the council, and did not fall within the provision that any bill not returned within ten days shall become a law.

The judgment of the Circuit Court is affirmed. The other judges concur.

THE STATE, *ex rel.* BALDWIN T. WHITE, Plaintiff in Error, *v.* DAVID GOODFELLOW, Defendant in Error.

March 21, 1876.

1. Under an act of the General Assembly, approved March 18, 1867, entitled "An act to enable the city of St. Louis to procure a supply of wholesome water," the board of commissioners thereby created was authorized to require the exclusive use by consumers of a particular kind of hydrant, which the board considered best adapted to promote convenience of supply with the least possible waste. Such a requisition was a reasonable exercise of the discretion committed to the board in its control of the water-works, and should not be interfered with by the courts.
2. Immaterial issues properly refused by the court.
3. In a *mandamus* proceeding, where the only issue raised is one as to the extent of authority conferred by law on an official body, neither party has a right to demand a jury.

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4. Where the facts admitted by a failure to reply cannot, if true, entitle the adverse party to the relief sought, no judgment can be entered for want of a reply.

5. The right of the board of water commissioners to make proper regulations concerning the use of water cannot be affected by any considerations with reference to the restraint of trade.

ERROR to St. Louis Circuit Court.

Affirmed.

Bell & Thompson, for plaintiff in error, cited: Session Acts 1867, p. 184; Session Acts 1868, p. 292; St. Louis v. Weber, 44 Mo. 550; Ruggles v. Collier, 43 Mo. 375; City v. Clemens, 43 Mo. 395; Chicago v. Rumpff, 45 Ill. 90; Bloomington v. Wahl, 46 Ill. 489; Wraford v. People, 14 Mich. 41; Phillips v. Allen, 41 Penn. St. 481; Hudson v. Thorne, 7 Paige (N. Y.), 261; Austin v. Charlestown, 16 Pick. (Mass.) 121; Boston v. Shaw, 1 Metc. (Mass.) 130; Commissioners v. Gas Co., 12 Penn. St. 318; Dunklin County v. District Court, 23 Mo. 454; 2 Wag. Stat. 925, sec. 4; State *ex rel.* v. Lafayette County Court, 41 Mo. 221; Dill. on Mun. Corp., sec. 93; Vaughn v. Scade, 30 Mo. 600; State, etc., v. Stewart, 32 Mo. 384; State, etc., v. Lawrence, 38 Mo. 539.

Samuel Reber, for defendant in error.

BAKEWELL, J., delivered the opinion of the court.

This was an application for a *mandamus*. Defendant was assessor of water rates of the city of St. Louis.

The relator of plaintiff alleges, in his petition, that he is a resident of the city of St. Louis; that the water supply of said city, and the control of its water-works, are, by law, intrusted to a board of water commissioners; that, under the regulations of said board, all persons introducing water from said water-works must first procure a permit from the assessor of water rates; that it is also essential that the water consumer provide himself with a hydrant on his premises, through which the water is supplied; that such hydrants are the private property of the consumer; that

eight styles of hydrants are used in St. Louis, of which one is called the "Valve," and another the "Gallagher," hydrant; that, on a day named, petitioner had put up a "Valve" hydrant, and in all other respects complied with the rules of the board of water commissioners and the city ordinance, and then applied to respondent for a permit to make an attachment between his premises and the main water-pipe on Green street, St. Louis, which respondent refused, on the sole ground that relator's hydrant was not the "Gallagher" hydrant. Relator says that, therefore, he cannot use the city water without getting a "Gallagher" hydrant, which he avers he ought not to be compelled to do; and being, he says, without other remedy, he asks for a writ commanding respondent to grant him the permit to make the attachment between his "Valve" hydrant and the main city water-pipe.

An alternative writ was issued, to which respondent made return, setting up, as his ground for refusing to allow plaintiff's relator to make an attachment of the main pipe to his "Valve" hydrant, a resolution of the board of water commissioners, to the effect that the assessor of water rates be instructed to notify all bonded plumbers that, after June 1, 1873, all hydrants connected with the city water-pipe shall be of the patent purchased by the city, of Joseph Gallagher, the right to use which is guaranteed by the board. This resolution was, he says, adopted by the board to prevent a waste of the city water, which he alleges to have been universal, and excessive, and ruinous. He further says that all other hydrants used in St. Louis prior to April 17, 1873, allowed a continuous flow of water when once set going, unless this was stopped by turning the cock; whilst the "Gallagher" hydrant is self-acting, stopping the water when the hand is removed, causing a great saving of water, whilst the other hydrants caused great waste; consequently, the city purchased the right for all bonded plumbers of the

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city to use this hydrant, without paying a royalty, the city looking to the saving of water only for its reimbursement of this outlay; that the resolution of the board was deliberately adopted, from conviction of its necessity, founded upon an examination of the comparative merits of the different hydrants in use; that the "Gallagher" hydrant costs the consumer no more than any other hydrant, is more simple, less liable to derangement and to be affected by frost; that the resolution of April 17, 1873, applies only to hydrants set up after that date; that the use of the patent is furnished to consumers gratuitously; that relator, well knowing the resolution aforesaid, and order of the board of water commissioners, wantonly procured a "Valve" hydrant, and insists upon a connection with the main pipe, merely to bring up before the courts the question of the legality of the aforesaid rule of the board, and that respondent refused to allow the connection to be made for the reason set forth.

Relator then moved for a peremptory *mandamus* on this return, first, because the return set up no good reason for the refusal; and, second, because the resolution of the board set forth in it is void.

This motion was overruled, and relator then filed a traverse to the return, in which, by a negative pregnant, he admits the resolution of the board set out in the return, and also the purchase by the board of the right to use the "Gallagher" hydrant for all the bonded plumbers, and says that, if there was any waste of water from the reservoir and mains, as claimed by respondent, ample remedies existed at the time to prevent it; and cites an ordinance of the city imposing a fine on any person permitting a waste of the water, and also giving the board of water commissioners power to ascertain, by meters, the quantity of water in any case. The traverse further alleges that, these ample remedies being provided, the use of the "Gallagher" hydrant

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was unnecessary, and imposed a useless burden and expense on consumers, and that it establishes a monopoly, is in restraint of trade, and is illegal.

To the traverse, no reply was filed. When the case was called for trial, the relator moved for judgment by default against respondent, for want of reply. This motion was overruled. Relator then demanded a jury to try the issues, which was overruled.

The relator then presented a statement of the issues to be tried in this case, in the form of questions to be answered by a jury, as follows:

1. "Was there any material waste of the water ot St. Louis, by consumers thereof, by reason of the defective character of the hydrant in use at and before April 17, 1873?"

2. "Were the ordinances of the city of St. Louis, set out in the denial of the returns made herein, sufficient, if enforced, to prevent any material waste of the water of the city at and before April 17, 1873?"

3. "Is any material saving of the water of the city effected by the use of the "Gallagher" hydrant, as compared with the use of any other hydrant heretofore manufactured or for sale in the city of St. Louis?"

Which statement was rejected by the court, and an exception saved.

The trial then proceeded before the court, without the intervention of a jury, and the respondent introduced evidence tending to show that at and prior to April 17, 1873, a material waste of the water of the city existed; that, owing to this fact, an investigation of the various hydrants in use was made by the board of water commissioners; that thereupon the resolution of April 17, 1873, was adopted, with a view to correct such waste of water; that the "Gallagher" hydrant was less liable to get out of repair, and less liable to waste water than the "Valve," or any other hydrant in use.

The relator introduced evidence tending to show that the

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"Gallagher" hydrant was more liable to get out of repair, and more liable to waste water, than the "Valve" hydrant.

At the conclusion of the testimony, the court entered judgment overruling the motion for a peremptory *mandamus*, and dismissing plaintiff's bill.

Within due time the relator filed a motion for a new trial, on the following grounds:

1. Because the court erred in refusing a jury trial.

2. Because the judgment was against the law and the evidence.

3. Because the court refused to enter judgment by default against the respondent, for failure to reply.

4. Because, upon the pleading, the relator was entitled to a peremptory writ of *mandamus*.

5. Because he was entitled to such writ under the evidence in the case.

6. Because the court erred in the statement of the issues to be tried in the case.

7. Because the court refused to try the issues in the case.

This motion was overruled. All exceptions were duly saved, and, on appeal to general term, the judgment having been affirmed, the cause is brought before us by writ of error.

The question presented by the record is the validity of the resolution of the water board, requiring all persons desiring to avail themselves of the use of the water collected and distributed by the city to form a connection between their premises and the main water-pipe by means of the "Gallagher" hydrant alone.

The grant of power to the board of water commissioners is derived from an act of the Legislature creating the board, approved March 13, 1867, and entitled "An act to enable the city of St. Louis to procure a supply of wholesome water." By this act, a board of water commissioners is created, with general powers to convey the water of the Mississippi through the city of St. Louis, and

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to do all things necessary for the purpose of purifying, conducting, straining, and distributing this water. The 6th section of this act provides that the city may, by the agency of this board, do all things necessary for carrying this act into effect. The 7th section provides that said board shall have control of all matters relating to the water supply in the city of St. Louis, and of the management and direction of the water-works. The 8th section provides that this board shall collect the revenue accruing to the city for water, and keep a full and true account of all licenses issued for the use of water.

It will hardly be pretended that, under and by virtue of these powers, the board of water commissioners has no right whatever to regulate the supply of water. On the contrary, it clearly appears that it is its most imperative duty to attend to this, to prevent unnecessary waste of this water collected and distributed at a vast expense, and to control its distribution in such a way that each license issued may, as far as that can be conveniently done, grant a use of water proportioned in some measure to the amount paid therefor. The board—which cannot, without a criminal neglect of duties imposed by this act, permit each citizen, at will, to bore a hole into its distributing pipes and attach thereto a tube conducting a perpetually flowing stream into his private premises—has certainly a right to direct that something in the nature of a hydrant—that is, of an instrument by which the flow of water may be checked and regulated at will—shall be placed at the end of the connection between the main pipe and the tube conducting the water into the tenement of the consumer. But, if it had a right to compel the use of a hydrant, it is difficult to see why it may not select, amongst many varieties of hydrants, that one which to the board may seem the best fitted to promote the end of convenience of supply with the least possible unnecessary waste, and, having selected such a hydrant, to insist upon its use by all persons seeking to connect a private

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water-pipe with the public main. A board such as this, created for municipal purposes, may exercise, not only the power granted to it in express terms, but also any power essential to the declared object and purposes of its creation, and also any fairly implied in, or incident to, the powers expressly granted. Now, as this board may exercise all the powers, within the fair intent and purpose of their creation, reasonably proper to give effect to powers expressly granted, in doing this they must have a choice of means adapted to these ends. *Bridgeport* v. *R. R. Co.* 15 Conn. 475. An act of the Legislature investing the County Court with power to do certain acts necessarily implies the right to use fit and appropriate means. *Hannibal & St. Joseph R. R. Co.* v. *Marion County*, 36 Mo. 294. We are of the opinion that the board of water-works of the city of St. Louis, by virtue of the act cited, has a right to adopt a particular hydrant, and insist upon its use by all persons seeking connection with the water-pipes of the city, and that, unless they act unreasonably or oppressively, their action is conclusive, and is an exercise of discretion with which the courts will not interfere. Judicial tribunals do not interfere with municipal corporations in their internal police and administrative regulations, unless some clear right has been withheld or some wrong perpetrated. To hold that the courts could interfere in such a case as that made out by the relator here, would be to remove the control of the water-works from the board expressly created for that purpose, and vest it in the courts. The board is not bound to use a hydrant absolutely the best. Nor are the courts to pass upon the relative efficiency of these machines for regulating the water supply. The relator very clearly had no case, and the Circuit Court could not do otherwise than dismiss his bill.

The court properly rejected the statement of issues presented to be tried; they were wholly immaterial, for the reasons already stated.

There was no error in refusing a jury trial, because there

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were no material issues of fact to submit to the jury; had the case been otherwise, in a proceeding of this character, the parties cannot insist upon a jury.

The court committed no error in overruling relator's motion for judgment for want of a reply. No reply was needed; the facts admitted for want of reply, if true, would not entitle plaintiff to the relief he asks.

There is nothing whatever in the allegation that the purchase of the right to use the "Gallagher" hydrant is a monopoly, or in restraint of trade. These points are not insisted upon in argument, and demand no notice at our hands. The board cannot be compelled to sanction the use of an inferior hydrant, or of a variety of hydrants, for the purpose merely of enlivening the local trade amongst plumbers.

We see no error committed by the court below, and the judgment of the Circuit Court is affirmed. Judge LEWIS concurs; Judge GANTT, of counsel below, did not sit.

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THE STATE, *ex rel.* CARLOS S. GREELEY *et al.*, Appellant, *v.* THE CITY OF ST. LOUIS *et al.*, Respondents.

March 21, 1876.

1. A return of the marshal, in proceedings before the land commisioner, that he "executed the writ by *having had personal service* on the following named defendants," naming them, is insufficient.
2. It should appear on the face of the proceeding that the land commissioner examined the jurors and found them disinterested and qualified according to law.
3. In proceedings to open a street, a jury cannot arbitrarily select a portion of a street, or of the city, as a taxing district, and assess benefits against it, unless, perhaps, in the case of abutters. Such action is unconstitutional.
4. After a rehearing is had, an appeal may be taken without a motion for a new trial having intervened.

APPEAL from St. Louis Circuit Court.

Proceedings, verdict, and judgment quashed.

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Leverett Bell and *W. H. Horner*, for respondents, cited: Cowers *v.* Iron Mountain R. R. Co., 48 Mo. 556; Papin *v.* Massey, 27 Mo. 453; Wall *v.* Nay, 30 Mo. 494; Acts of Missouri, 1870, 478, sec. 2; Blaisdell *v.* Steamboat Pope, 19 Mo. 159; Stewart *v.* Stringer, 45 Mo. 116; Muldoon *v.* Bates, 5 Mo. 214; Wag. Stat., secs. 19, 20, p. 1036; Tyler *v.* City, 56 Mo.; State *ex rel.* *v.* City, 52 Mo. 574; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495; Uhrig *v.* City, 44 Mo. 459; Newby *v.* Platte, 25 Mo. 264; People *v.* Mayor of Brooklyn, 4 Comst. (N. Y.) 419.

Holmes & Holmes, for appellant, cited: Ells *v.* Pacific R. R. Co., 51 Mo. 200; Leslie *v.* City of St. Louis, 47 Mo. 474; Anderson *v.* City of St. Louis, 47 Mo. 479; Ruggles *v.* Collier, 43 Mo. 353; Hewitt *v.* Weathersby, 57 Mo. 276; Huff *v.* Shepard, 58 Mo. 246; 2 Dill. on Mun. Corp., sec. 471, p. 571; Session Acts 1870, p. 478, sec. 2; City of Boonville *v.* Armrod, 26 Mo. 193; People *v.* Brighton, 20 Mich. 57; Nichols *v.* Bridgeport, 23 Conn. 208; Farmington *v.* Morgan, 20 Wend. 207; Dickey *v.* Tennison, 27 Mo. 373; Smith's Admr. *v.* Rollins, 25 Mo. 408; Waddington *v.* City of St. Louis, 14 Mo. 190.

Bakewell, J., delivered the opinion of the court.

This was a proceeding to vacate the proceedings of the city of St. Louis and the land commissioner, in the matter of opening Franklin avenue, in the city of St. Louis, from the western boundary line of Stoddard addition to the eastern boundary line of school section No. 16, under ordinance 4724, approved July 24, 1860.

The relators alleged in their petition that they owned a lot, of 250 feet, on the south side of Franklin avenue, and a lot, of fifty feet, on the north line of Franklin avenue; that, in virtue of the revised charter of 1870, and the ordinance aforesaid, respondents, on January 11, 1873, commenced proceedings to open said avenue; issued notice, and proceeded to impanel a pretended jury, which, on March 8, 1873, rendered a verdict assessing the aggregate

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value of the property taken at $18,387, of which $1,838.70 was assessed against the city, and $16,548.30 against persons supposed to be benefited, of which sum there was assessed against relators and their property aforesaid $940.80; which verdict was confirmed by the city council, and judgment rendered therefor by the land commissioner. The petition then sets out that the proceedings were irregular in many respects, which are fully set forth, and prays that the record may be inspected by the Circuit Court, and the whole proceedings quashed on account of these alleged errors. The writ issued; and, after a reassignment of errors by petitioners, on hearing, the judgment and proceedings were, by the Circuit Court, quashed; but, on rehearing, this judgment was set aside, and the proceedings and judgment of the city and land commissioner were affirmed. Relators excepted to the granting a motion for a rehearing, and to the action of the court in overruling their assignment of errors set out in their petition, and in affirming the proceedings and judgment of the land commissioner; and they bring the case here by appeal.

Respondents insist that, no motion for a new trial having been made by appellants below, the judgment of the court below should be affirmed. We do not so think. There was no necessity for any such motion to give to the Circuit Court an opportunity of correcting any errors it had committed. The reassignment of errors sufficiently shows the points insisted upon below; and, after giving judgment for appellants, granting a rehearing and reversing its judgment, it may be presumed that the Circuit Court had every opportunity of correcting errors, and acted with matured judgment, after full consideration of every material point in the case.

The exceptions to the proceedings before the land commissioner are numerous. The following are those upon which appellants seem most to insist:

1. It is claimed that the land commissioner acquired no

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jurisdiction of the relators or their property, there having been no service of notice on them as required by law; and, further, that, of the ten persons whose property it was proposed to take for the opening of Franklin avenue, only two were legally served. The record shows nothing as to any voluntary appearance, and, as to relators, they did not appear, as far as the record shows.

The law requires (Acts 1870, p. 478, sec. 2) that six days' written or printed notice shall be given to the person whose property is to be condemned, which notice shall be served by the city marshal, either by delivering the same to such person, or by leaving a copy thereof at the usual place of abode of such person, with some member of the family over the age of fifteen years; or, if the owner of any such property is unknown, or absent from the city, or cannot be served in this manner, such notice shall be published at least four weeks in the two daily papers doing the city printing.

The return on the original papers sent him shows that the notice of the land commissioner was issued against eighty-five persons, including relators. The return of the marshal is in these words: "Executed the within writ in the city of St. Louis, on January 16, 17, and 18, 1873, by *having had personal service on the following named defendants.*" Then follow the names of relators and forty-three others.

We do not think this return was sufficient to give the land commissioner jurisdiction of those persons whose property was to be condemned. Jurisdiction over a person can never be acquired, except in case of consent, unless by a method which the law specifically provides. We do not know what may have been the deputy marshal's idea of "having had personal service." He may have considered an offer to read the notice, or actual reading of it, a personal service, as is the practice in serving a subpœna. There is nothing to show that the notice was delivered to defendants, or left at their respective places of abode, as the law

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requires. To this it may, perhaps, be replied that relators do not come within the class whose property was to be condemned, but are of the class whose property was to be assessed to pay damages; and that the provisions of the law, as to notice to this latter class, have been substantially complied with. This can hardly be material, as, if those whose property it was proposed to take were not served, and did not appear, the proceedings must necessarily be void, not only as to them, but also as to those assessed for benefits. It appears, however, that the notice to relators, who were of the class assessed benefits, was not in compliance with the law. In regard to notice to this class the law says, in the section quoted above: "Such notice shall be served or published for the same terms of time, for like causes, and with like effects, respectively, as is provided for notices in cases of condemnation." It is true that it is not expressly said that such notice shall be served in the same manner in the case of the latter class of persons as in the case of the former; but no other way of serving it is prescribed, and it is the obvious intention and meaning of the law that the service, as to both classes, shall be made in the same way. If this be not a correct interpretation of the law, then it provides no manner whatever for serving notice upon those whose property it is proposed to assess, which would be absurd, as they are likely to be quite as much affected by the proceedings as those whose property is directly taken, and are, in some instances, much more seriously affected by them than the property holder whose real estate it is the direct object of the proceedings to condemn.

We are of opinion, therefore, that there is no evidence that legal notice of these proceedings was ever given to the relators and the forty-three other defendants, as to whom the return of the marshal is the same.

2. Another objection made by the relators is that it does not appear that the jurors impaneled in said proceedings

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were, each and all of them, "disinterested freeholders of the city of St. Louis."

The law under which these proceedings were had requires "a jury of six disinterested freeholders of the city." Acts of 1870, p. 478, sec. 1. The law in regard to all special proceedings in derogation of private rights requires the jurisdiction and regularity to be manifest on the face of the record, and no substantial omission can be supplied by intendment. A private citizen might as well assume to act in lieu of a judicial officer, as any but a disinterested freeholder of the city to sit on this inquest. Now, the minutes of the commissioner do not state that he had examined the jurors and found them qualified. The *venire* commands the marshal to summon "twenty-four good and lawful men, disinterested freeholders of the city of St. Louis;" the return states that he has summoned the "good and lawful men, disinterested freeholders;" it does not say that they are of the city. The minutes of the land commissioner say that "the following good and lawful freeholders of the city of St. Louis" were summoned, setting forth their names, and that six, whose names are given, were examined and accepted, and sworn as jurors. But it nowhere appears that the jurors were, on examination, found to be disinterested, as the law requires. The verdict describes them as "six respectable freeholders of the city of St. Louis, and resident therein." This objection should, we think, be sustained.

3. The law under which these proceedings were had provides that the jury is to ascertain the actual value of the land proposed to be taken for the opening, and for the payment of the damages or compensation for that value. Benefits are to be assessed against the city for the public use generally, not to exceed one-tenth of the whole award, "and the balance against the owner or owners of the property benefited by the opening of such street, according to the value of the property so assessed, and in proportion to

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the benefits such property respectively received from the proposed improvement, not to be less than to the middle of the adjoining block, or, if not laid out into blocks, then to the depth of not less than 150 feet, running back from the line of such street or other place as is proposed to be opened."

Under this authority the ordinance (No. 4724) defines the street proposed to be opened as "Franklin avenue, from the western boundary of Stoddard addition to the eastern boundary of school section 16."

Franklin avenue is a street of St. Louis, extending from Grand avenue to Broadway, a distance of about three miles. The portion opened by these proceedings is a few hundred yards in length. The ordinance describes the proposed opening as one "to connect with the termination of the street as already laid out and opened, east and west of the proposed opening." The land of relators was on the line of this street, but not within the portion which these proceedings were instituted to open. The verdict of the jury shows that a plat was made and laid before them, by the city engineer, of Franklin avenue, from Leffingwell to Grand avenue, a distance of over a mile, including the proposed opening, about equidistant from those two streets, and that, along their whole length, the jury assessed the value of the property taken, and then assessed benefits against the property holders fronting on Frankling avenue, between Leffingwell and Grand avenues, for a depth of one-half of the blocks, or of 150 feet from the line of the street.

It is contended by relators that this could not lawfully be done. That this was not a local assessment within a district defined by law, and in due proportion, and to the extent of such benefits, and that the jury could not arbitrarily single out the property holders along the line of a portion of Franklin avenue from the mass of their fellow-citizens, and impose a tax upon them for a benefit common to the city. It is maintained that to do so was a violation of the Constitution of this State and of the United States.

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Two questions arise: First, whether such action on the part of the jury was warranted by the law which we have recited; and, second, whether, if they correctly interpreted the law, such a statute is in violation of constitutional provisions.

That the expense of such improvements may be assessed upon the property benefited, found by a jury to be benefited, or legislatively declared to be benefited, and that it is not necessary to confine it to the abutters alone, according to their frontage or according to the area of their lots, is a proposition as to which we entertain no doubt. This may be done in the absence of some special restraining constitutional provision on the subject, and there is no such special provision in the Constitution of our State. Dill. on Mun. Corp., sec. 596. In fact, whether it would be competent for the Legislature to place the whole burden upon the abutters is a question involving serious doubts. Cooley on Const. Lim. 508. But this verdict, if sustained, would establish the principle that a jury, in cases of this kind, can arbitrarily select a portion of a street, or a portion of the city, as a taxing district, and assess benefits against it. It has been held competent for the Legislative power to make an entire street a taxing district for a purpose of this kind, but I am not aware that any authority can be cited maintaining the constitutionality of a law giving to any man, or body of men, the right arbitrarily to lay out a portion of the street improved as a district alone to bear the burden of the improvement, unless in the case of abutters upon the improvement itself. Taxation must be uniform. The Constitution of every State in the Union contains some provision to that effect. If, then, the law under which this jury claimed to act must be so interpreted as to sanction their proceedings in this respect, it would seem to be unconstitutional.

But the law, by its terms, gives no such authority. It provides that the owner or owners of property benefited by the opening shall all be assessed for a depth of not less

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than half a block, or 150 feet, as the case may be, along the entire line of the street. It does not say that the jury shall not go back more than half a block, or more than 150 feet, but it compels them to go back that depth, and to assess along the entire street. The jury have manifestly misinterpreted the law, in that they have confined their finding to a depth of half a block, or 150 feet where there is no block, and have arbitrarily confined their assessment to a portion only of the street improved.

For these reasons we think the judgment of the Circuit Court should be reversed, and the proceedings herein before the land commissioner, and the verdict and judgment thereon, should be annulled and held for naught. The proceedings before the land commissioner and the verdict and judgment are quashed. The other judges concur.

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THE STATE OF MISSOURI, to use of MARY MUDD *et al.*, Plaintiff in Error, *v.* WILLIAM SHAW *et al.*, Defendants in Error.

March 21, 1876.

A guardian filed an account in the Probate Court, showing an indebtedness of $1,096.71 to his ward, who was then of age. He failed to pay this sum, and soon died. This sum was subsequently allowed and classified in the Probate Court, as a demand against his estate. Afterwards the executor of the guardian was allowed, by the Probate Court, to restate the account without notice to the ward. In a suit on the guardian's bond to enforce the collection of the $1,096.71, the court permitted defendants to show the settlement made by the executor. *Held*, that this was error; that this settlement was without legal warrant; and that the allowance of the claim by the Probate Court against the guardian's estate was conclusive unless reversed by a direct proceeding.

ERROR to Lincoln Circuit Court.

Reversed and remanded.

Martin & Lackland, for plaintiff in error, cited: State *v.* Grace, 26 Mo. 87; State *v.* Drury, 36 Mo. 281; Frost *v.* Winston, 32 Mo. 189.

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McKee & McFarland, *Fagg & Biggs*, for defendants in error.

Gantt, P. J., delivered the opinion of the court.

This action was brought to the March term, 1874, of the Lincoln Circuit Court, on a bond to the State of Missouri, dated November 13, 1858, executed by David Stuart as principal, and L. H. Paxton, W. W. Shaw, William T. Stuart, and others as sureties, in the penal sum of $36,000, conditioned for the faithful performance, by David Stuart, of his duties as curator of the heirs of James F. Moore. The petition set forth that Stuart took on himself the duties of curator, and that Mary, since intermarried with Edwin C. Mudd, was one of the heirs of Moore; that Stuart died in June, 1871; that Mary was, before his death, of full age and married to Edwin C.; that W. W. Shaw and William T. Stuart were duly appointed administrators of the estate of David Stuart, deceased, they having also been two of his sureties on his curator's bond; that, at the January term, 1871, of the Probate Court of Lincoln county, David Stuart made a settlement of his curatorship, and the sum of $1,096.71 was ascertained to be due from him to Mary Mudd; that, at a settlement made by the said administrators of David Stuart with the Probate Court of Lincoln county (time not stated), it was ascertained that the said sum of $1,096.71 was due from said estate of David Stuart to the said Mary Mudd, and the administrators were ordered to pay it; that various sums have been paid, to wit, $70 on May 26, 1873; $50 on January 30, 1873, and $150 on June 27, 1873; that the balance remains unpaid, and plaintiffs asked for judgment against the sureties in the curator's bond for the amount of the balance, with interest from January 11, 1871, at the rate of 10 per cent., less the several credits named. To this petition W. W. Shaw and William T. Stuart filed their separate answer, admitting that they were sureties on the curator's bond of David Stuart, the death of Stuart, their appointment as administrators,

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and the ascertainment at the January term, 1871, of the Lincoln Probate Court, of a balance of $1,096.71 in favor of Mary Mudd, for which sum a judgment was rendered; and stating that defendants, as administrators of David Stuart, proceeded to make settlement of the accounts of David Stuart with his ward; and on October, 17, 1873, the Probate Court found a balance due from said estate to said ward of $888.56 and ordered it to be placed in the fourth class; and that since October 17, 1873, the following sums have been paid on account of said claim, to wit, $200 on October 27, 1873; $115 on November 24, 1873; $118.25 on December 29,1873; $150 on January 12, 1874; $71.50 on February 2, 1874, and $150 on February 16, 1874, making in all $804.80; that the balance due is $———, which they tendered to the plaintiffs on —— —, 1874, and now bring the same into court.

The court, on a trial before it, gave judgment for $101.06, and 10 per cent. interest, on October 10, 1874. The plaintiffs tendered a bill of exceptions, by which it appeared that, at the January term, 1871, of the Lincoln Probate Court, David Stuart appeared to be indebted to Mary Mudd in a balance of $1,096.71.

The entry of the Probate Court was as follows:

"On settlement with Mary Moore (now Mary Mudd), made by David Stuart, her curator, the court finds, upon adjusting his accounts, that he is indebted to said ward in the sum of two thousand three hundred and fifty-two dollars and three cents, and is entitled to credits of one thousand two hundred and fifty-five dollars and thirty-two cents, leaving a balance due said ward of one thousand and ninety-six dollars and seventy-one cents, with which amount said curator is now here charged."

At the April term, 1873, of the Lincoln Probate Court, this amount was allowed and classified against the estate of David Stuart. The settlement in January, 1871, had been with and in favor of all the heirs, of whom Mary Mudd was

one; and this memorandum was added to the entry of the judgment: "The said amounts so classified to be subject to any and all payments made to said parties, or their present guardian, by the administrators of David Stuart, deceased."

It was proved that Mary Mudd was of age before she was married, which was before January, 1871; that her husband demanded from David Stuart, in his life-time, the payment of the balance ascertained by that settlement in January, 1871; that he had repeatedly demanded it from the administrators of Stuart since the allowance of the demand in 1873, and that, shortly before this suit was commenced, W. W. Shaw had offered to pay to Mudd $101.06 if he would give him a full release; this, Mudd refused. This was all the evidence offered by plaintiffs.

Defendants offered the record of a settlement made with the Probate Court, at the October term, 1873, which was objected to because plaintiffs had no notice of the settlement, were not parties to it, and were not bound by it, because, "the guardianship having been fully settled in April, 1873, there could be no further valid settlement." The court admitted the record, plaintiff excepting. Defendants then read the entry as follows:

"On settlement with David Stuart, deceased, curator of the following heirs, said settlement being made by Stuart and Shaw, administrators of the estate of David Stuart, the court finds, upon adjusting his accounts, that he is indebted to said wards in the following amounts, to wit: To James F. and Bathsheba Moore, $13,257.50, less credits of $9,873.26, leaving a balance due said wards of $3,393.74. To Elizabeth Moore, $5,592.87, less credits of $4,207.48, leaving a balance due said ward of $1,385.39. To Mary Mudd (formerly Moore) $1,276.45, less credits of $387.89, leaving a balance due said ward of $888.56."

The defendants then, against the objection and exception of plaintiffs, read the whole settlement, which was as follows:

"Settlement of David Stuart, deceased, curator of Mary

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Mudd (formerly Moore) by W. W. Shaw and William T. Stuart, administrators:

	Cr.	*Dr.*
To amount due January 11, 1871......		$1,096.71
Interest to June 7, 1873, (6 per cent.)..		158.26
		$1,254.97
Credit by one-fourth of the amount paid Campbell, Fagg & Dyer, McKee & Frazier, and other attorneys, in suits benefit of all the heirs, and interest thereon to June 7, 1873 (see vouchers in settlement of Jas. F. and Bathsheba Moore)...........................	$107.58	
By voucher No. 1, cash paid ward January 30, 1873......................	50.00	
Interest to June 7, 1873...............	1.05	
Voucher No. 2, cash paid ward May 26, 1873...............................	70.00	
Interest to June 7, 1873..............	.13	
		228.76
		$1,026.21
To interest to October 14, 1873.........		21.48
		$1,047.69
Credit June 27, 1873, cash paid ward...	150.00	
Interest to October 14, 1873...........	2.76	
By cash paid McKee, attorney, one-fourth of $5............................	1.25	
By cash paid McKee this settlement....	1.25	
Clerk's fees, voucher No. 4...........	3.87	
		159.13
Leaving a balance due said ward of.....		$888.56

this 14th day of October, 1873, and the said administrators

of David Stuart, deceased, late curator, are ordered to pay same to said ward. Approved October term, 1873.

S. R. MOXLEY, *Judge*."

W. W. Shaw testified that "the items charged in said settlement in record, in October, 1873, were mostly, if not all, for services rendered since the settlement made by David Stuart in 1871, and that the services for which said fees were paid were collecting money in notes due David Stuart as guardian of said ward; that in making said settlement, in October, 1873, 6 per cent. interest only had been charged from the settlement made in January, 1871."

Plaintiff asked the court to declare the law to be that:

1. "The settlement made in the Probate Court, at the April term, 1873, is binding and conclusive upon all parties to said settlement, and the finding of the court, at said settlement, of the amount due Mary Mudd, is conclusive upon the securities in the curator's bond herein sued on."

2. "That the failure to pay the amount found by said court, on said settlement, to be due said Mary Mudd, when demanded of William T. Stuart and William W. Shaw, administrators of David Stuart, deceased, and securities on said curator's bond, constituted a breach of said bond for which an action would lie."

3. "In the event plaintiff has shown itself entitled to recover in this case, the measure of damages will be the amount of balance shown on settlement at January term, 1871, with 10 per eent. interest thereon from said January term, 1871, less whatever amounts have been paid to relators herein since said settlement in January, 1871."

The court refused the first and third of these instructions, and plaintiff excepted. The court then found $101.06 to be due Mary Mudd and her husband, and gave judgment accordingly. Plaintiffs filed a motion for a new trial, which being overruled, they sued out a writ of error, and the case is before us for examination.

The points made, on motion for a new trial, are:

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1. That the court erred in refusing the declarations of law asked by plaintiffs.

2. That the court erred in allowing defendant's attorney's fees, as charged by Shaw and Stuart, administrators of David Stuart, in their settlement made at the October term, 1873.

3. The court erred in not allowing plaintiffs interest, at the rate of 10 per cent., from the settlement made by David Stuart at the January term of Probate Court, 1871.

4. The court erred in permitting the introduction by defendants, as evidence, of the record of the Probate Court, showing settlement made by Shaw and Stuart, administrators, at the October term, 1873.

5. The court should have found a verdict for plaintiffs for $1,096.71, the amount as shown due by David Stuart's settlement, in January, 1871, less the payments, with interest from said settlement at the rate of 10 per cent.

1. The Circuit Court erred in admitting what is called a record of a settlement made of the accounts of "David Stuart, deceased, curator, by his administrators, Shaw and Stuart," at the October term, 1873. The inadmissibility of this record, to effect the rights of Mary Mudd, rests upon many sufficient objections, all of which were taken by the plaintiffs below and overruled by the court.

First. Mary Mudd was no longer a minor. A settlement had been made with her, by David Stuart, in January, 1871, after her marriage, and after she had reached the age of eighteen years, and a balance of $1,096.71 was then ascertained to to be in his hands. Her husband demanded this money from Stuart in his life-time. When this was, we are not told; but, as Stuart died in June, 1871, it must have been before his death. The demands of Mary Mudd were allowed against the estate of David Stuart, deceased, at the April term, 1873, and classified. This allowance had all the force and effect of, and in fact was, a judgment against the estate of David Stuart, and, until reversed—which could

only be in the Circuit Court on appeal—was not subject to change.

We note that on this occasion nothing was said about the rate of interest. All judgments bear interest, by our statute, from their date; but the rate depends on that which the demand bore before being reduced to judgment. If it was intended that this allowance should bear interest at 10 per cent. from January, 1871, all steps proper for obtaining a judgment to that effect appear to have been omitted. We have nothing before us from which we can see that the estate of Stuart was liable for more than 6 per cent. interest. If it had been shown that Edwin C. Mudd had demanded this money from David Stuart in his lifetime, we think the Probate Court, in 1873, should have given judgment or made an allowance in favor of Mary Mudd for $1,096.71, with 10 per cent. interest from January term, 1871, or the date of the demand; and that the allowance should have been made of the whole amount of principal and interest, the sum total to bear 10 per cent. interest till paid. As this was not done then, it is, perhaps, too late to move in the matter now.

Second. Such payments as were made after, or as had been made before, the allowance and classification in 1873 to the ward — that is to say, to Mrs. Mudd or her husband—were to be credited on this judgment; but there was no warrant for the Probate Court sitting again to adjust the accounts of David Stuart, curator of Mary Mudd. He was dead; he had settled his accounts with her; and she had not only reached full age, but, by her marriage, her business had passed into other hands than those of her late curator. The Probate Court had no shadow of jurisdiction to adjust his accounts as curator of Mary Mudd after his settlement in January, 1871. If, indeed, after that term and during his life, any error had been disclosed in that account, it might, perhaps, upon notice to her, have been corrected; but after the

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allowance, in 1873, against his estate of the balance shown in his hands as curator, nothing of that kind was possible for the Probate Court. Mrs. Mudd was no party to what is called a settlement, in October, 1873, of David Stuart's accounts as curator of Mary Mudd. The Probate Court had no longer jurisdiction of this subject, and what was called the record of that settlement was so much waste paper, so far as Mrs. Mudd was concerned.

2. If we were certain of the credits to which this allowance is entitled, we would give final judgment in this court, and, in so doing, correct some of the errors which are displayed in the account embodied in the supposed record of October, 1873, in respect of interest. The rule on this subject is laid down by the Supreme Court of Missouri. *Riney* v. *Hill*, 14 Mo. 500. Interest should be computed on the sum due up to the first partial payment, and added to the principal. From the amount resulting, the partial payment is to be deducted. Interest should then be computed on the remainder up to the second payment, and from the amount then due the second partial payment should be deducted, and so on until full payment is made—taking care, always, that, if the partial payment be less than the accrued interest, the principal last ascertained shall be the sum on which any subsequent interest is computed. This precaution is necessary to prevent the payment of interest on interest. In no case is it proper to compute interest on payments. It is a slovenly practice ignorantly resorted to by some accountants, but is condemned by the law.

The plaintiff filed no reply to the defendant's answer, and that answer set up credits which in the aggregate amount to $804.75. If the plaintiff meant to admit these as claimed, nothing obstructs our giving final judgment here. These credits, and those stated in the petition, are all to which the defendants are entitled. We reverse the judgment of the Circuit Court for the error indicated in admitting against Mary Mudd the so-called settlement made of his accounts

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as curator, by the administrators of David Stuart, more than two years after his death, and nearly three years after his own settlement of those accounts. We find no case precisely in point in the decisions of our own Supreme Court, but we find in *Caldwell* v. *Lockridge*, 9 Mo. 362 and following, more than sufficient aid from authority, and, if the case were entirely of the first impression, we would have no difficulty in reaching the same conclusion. We give leave to the plaintiff to move, during the term, for final judgment; the account as to interest being stated according to the rules indicated by this opinion. It need hardly be said that no tender is shown by the defendants. Not only did they fail to evince a willingness to pay what was due, but they coupled their offer with a condition which would be fatal to any tender. *Glascott* v. *Day*, 5 Esp. 48; *Huxham* v. *Smith*, 2 Camp. 21; *Evans* v. *Judkins*, 4 Camp. 156. All the judges concur in reversing and remanding the cause.

CHARLES H. BLANCHARD, Respondent, *v.* ABRAHAM S. WOLFF, Appellant.

March 21, 1876.

A sued B in the St. Louis Circuit Court. He became nonsuit with leave, etc., and the general term set aside the non-suit. B appealed to the Supreme Court, but failed to give the bond required by section 2, p. 17, Acts of 1869. *Held*, that the Circuit Court had no power to grant an appeal without the appellant giving such bond.

APPEAL from St. Louis Circuit Court.

Cause remanded for trial.

Marshall & Barclay, for appellant, cited: Bateson *v.* Clark, 37 Mo. 31; Richardson *v.* George, 34 Mo. 108; Brady *v.* Connelly, 52 Mo. 19; Cowen *v.* St. Louis & Iron Mountain R. R. Co., 48 Mo. 556; Matlock *v.* Williams, 59 Mo. 105; Acock *v.* Acock, 57 Mo. 154; Burnes *v.* Whelan,

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52 Mo. 520; Carver *v.* Thornhill, 53 Mo. 283; State *v.* Marchall, 36 Mo. 400; Collins *v.* Saunders, 46 Mo. 389; Wag. Stat. 1021, sec. 48, p. 1034, sec. 3, p. 1060, secs. 44, 45; Coleman *v.* McKnight, 4 Mo. 83; Routsong *v.* Pacific R. R. Co., 45 Mo. 236; Henri *v.* Grand Lodge, 59 Mo. 581; United States *v.* Gamble *et al.*, 10 Mo. 457; London *v.* King, 22 Mo. 336; Christy *v.* Myers, 21 Mo. 112; Blonset *v.* Zink, 55 Mo. 455; Brown *v.* Foote, 55 Mo. 178; Berry *v.* Smith, 54 Mo. 148; Tilford *v.* Ramsey, 43 Mo. 410; McKay *v.* Underwood, 47 Mo. 185; Collins *v.* Bowmer, 2 Mo. 195; Boggers *v.* Cox, 48 Mo. 278; Rankin *v.* Perry, 5 Mo. 501; Perry *v.* Alrood, 5 Mo. 503; Strouse *v.* Drennan, 41 Mo. 289; Pearson *v.* Lovejoy, 53 Barb. 407; Isbella *v.* Pecot, 2 La. An. 387; Graves *v.* Black, 1 Mo. 221; Blunt *v* Shepard, 1 Mo. 219; Ringgold's Case, 1 Bland (Md.), 5; State *v.* Saline County, 51 Mo. 350–374; Sedgw. on Stat. & Const. Law (2d ed.), 40; Headlee *v.* Cloud, 51 Mo. 301; Wilson *v.* Allen, 3 How. (N. Y.) Pr. 369; Irwin *v.* Bank, 6 Ohio St. 81–89; Brightley's Dig. 258, sec. 2; Martin *v.* Hunter, 1 Wheat. 361; Seymour *v.* Freer, 5 Wall. 822; Anson *v.* R. R. Co., 23 How. 1; Manderville *v.* Riggs, 3 Pet. 490; Price *v.* R. R. Co., 40 Ill. 44; Wilgus *v.* Gettring, 19 Iowa, 82; Brobst *v.* Brobst, 2 Wall. 96; Pratt *v.* R. R. Co., 21 N. Y. 305; Dougherty *v.* Volloton, 38 N. Y. 455; Gillilan *v.* Gray, 13 Ill. 705; French *v.* Snell, 30 Me. 100; Commonwealth *v.* Dunham, 22 Pick. (Mass.) 11; Wag. Stat. 850, sec. 17.

J. S. Garland, for respondent, cited: Story on Bail. (8th ed.), secs. 2, 4, 61, 107, 117, 118, 261; Foster *v.* Essex Bank, 17 Mass. 479, 498; 2 Pars. on Con. 96; Nicholson *v.* Chapman, 2 N. H. 254; Rivera *v.* Ghio, 3 E. D. Smith (N. Y.), 264; Esmay *v.* Fanning, 9 Barb. 176; Wiser *v.* Chesley, 53 Mo. 547; Edw. on Bail. 88; Beardslee *v.* Richardson, 11 Wend. 25; McNabb *v.* Lockhart, 18 Ga. 495; Scott *v.* Crane, 1 Conn. 255; Slingerland *v.*

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Morse, 8 Johns. 474; Rankin *v.* Perry, 5 Mo. 501; Tilford *v.* Ramsey, 43 Mo. 410; McKay *v.* Underwood, 47 Mo. 185; Coleman *v.* McKnight, 4 Mo. 236; Henri *v.* Grand Lodge, 59 Mo. 581; Routsong *v.* Pacific R. R. Co. 54 Mo. 236; Walter *v.* Cathcart, 18 Mo. 256; Thurman *v.* Jones, 48 Mo. 235; Wordmanser *v.* Hitchcock, 40 Mo. 179; St. Jo. R. R. Co. *v.* Mahoney, 42 Mo. 467; Jones *v.* Fuller, 38 Mo. 363.

GANTT, P. J., delivered the opinion of the court.

It appears from the record before us that Blanchard sued Wolff for the conversion of certain personal property; that Wolff denied the conversion and set up new matter, to which Blanchard replied; that a trial was had, at which Blanchard became nonsuit; that he filed a motion to set the nonsuit aside, which the court overruled; and that he presented, and the court signed, a bill of exceptions which omitted to set forth the motion to set the nonsuit aside, and failed to save an exception to the action of the court overruling the motion; that the court in general term reversed the judgment of the court at the special term; that the defendant, Wolff, filed a motion for rehearing, and that this motion was overruled by the court in general term. Thus far we are able to go, but here we are obliged to stop. There is no appeal in this case which authorizes us to "hear and determine" the matters which have been argued, and argued with ability, by the counsel for appellant. Obviously there is no final judgment in the cause. Plaintiff took a nonsuit with leave, etc. The refusal of the court at special term to set this nonsuit aside was final as to him. He properly went to the general term to get rid of this judgment. When the general term reversed the judgment of the special term, the nonsuit was set aside and the cause reinstated. It stood for trial *de novo*. Clearly there was no final judgment, and it is only from "final judgments" that an appeal is allowed by the general law. 2 Wag. Stat. 1059, sec. 9. But an appeal is allowed from the judgments of the St. Louis

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Circuit Court in general term, although such judgments may not be final, under the peculiar provisions of section 2 of the act of February 25, 1869. Session Acts 1869, p. 17. In order to take an appeal under this section, of course compliance with its conditions must be shown. Only by observing those conditions could the defendant take such an appeal. One of these is the giving of a bond in a penal sum sufficient to secure to the plaintiff the satisfaction of any judgment that may be rendered in the cause, to be approved by the court. If the court had approved a bond in an insufficient penal sum, we might think ourselves warranted in allowing the appeal to stand, on condition of the appellant perfecting a proper bond here; but that is the utmost stretch of indulgence. Without any bond at all, the Circuit Court had no power to allow an appeal, and in this case no bond was offered or approved; consequently, there is *no appeal* from the decision of the Circuit Court in general term, and we order that fact to be certified to the Circuit Court, so that it may proceed with the determination of the cause in such manner as the state of the record will allow. All the judges concur.

GANTT, P. J., delivered the opinion of the court on motion for a rehearing.

Our opinion in this case was founded on the construction we gave to the acts organizing the St. Louis Circuit Court under the Constitution of 1865, and the several acts since passed prescribing the practice therein. In their motion for a rehearing, the counsel for appellant urge that these acts are materially modified by the act of February 28, 1871. We state briefly our reasons for overruling this motion, founded, as we conceive it to be, upon a misconception of these statutes.

The acts which ascertain the practice in the St. Louis Circuit Court are dated, respectively, December 19, 1865, February 25, 1869, and March 4, 1869. The last two dates

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refer but to one act; the latter statute being passed to remedy a trivial mistake in the first, not, however, material to the subject under discussion.

The title of the act of December 19, 1865, is: "An act to provide for the reorganization of the St. Louis Circuit Court, and regulate proceedings therein." It is hardly necessary to recall to the memory of the bar that prior to the Constitution of 1865 there were three courts of civil jurisdiction in St. Louis county, to wit, the Circuit Court, the Court of Common Pleas, and the Land Court; that the object of the Constitution of 1865 was to abolish the last two, and to introduce, in respect of the Circuit Court of St. Louis county, a system of practice in imitation of that adopted in New York and Ohio—creating for the Circuit Court a special and a general term, and making the latter, in effect, an appellate court. This was all foreign to the practice which had for more than sixty years prevailed in Missouri. At the same time, for the rest of the State, District Courts, a system of intermediate appellate courts between the Circuit Court and the Supreme Court, were established. In order to give full effect to the constitutional requirements, some legislation was necessary; and this, as far as St. Louis was concerned, was furnished by the act of December 19, 1865. This act referred to St. Louis county only, and was, therefore, of a local and special nature. In the rest of the State, provision was also made by law for the establishment of District Courts and the practice therein. There was no District Court in St. Louis, nor was any case tried in this county liable to be reëxamined by a District Court. In the rest of the State, on the other hand, the distinction between special and general term of the Circuit Court was unknown.

The new practice was, from the first, disrelished by the bar of Missouri; but organic reforms were needed to get rid of its most objectionable features. In 1869, however, legislation was obtained which was certainly a considerable alle-

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viation of the evils imposed by the system as adopted in 1865. The act of 1869 was entitled: "An act to amend 'an act to provide for the reorganization of the St. Louis Circuit Court, and regulate proceedings therein,' approved December 19, 1865," and, among other things, amended section 14 of that act so as to make it read: "A judgment or decree rendered or order made by said court at special term may be reversed, vacated, or modified at general term, for errors appearing in the records at special term or presented by exceptions taken thereat, * * * but from * * * any judgment rendered or decree or order made at general term, reversing or modifying a judgment rendered or decree or order made at special term, the party or parties aggrieved thereby may appeal to the Supreme Court in the same manner and with the like effect as provided for by law in respect to appeals from final judgments rendered by the said court at general term; *provided*, that no appeal provided for in this section shall be allowed unless the party or parties taking such appeal shall first secure to the adverse party or parties in the cause the due performance and satisfaction of such final judgment as may be ultimately rendered in the cause, whether in the Supreme or Circuit Court, which security shall be given by a good and sufficient bond with two sureties," etc. The act of March 4, 1869, purporting to amend the act of February 25, 1869, does not change it in the passages quoted.

Thus stood the law when, in 1870, a constitutional amendment was adopted, enabling the General Assembly to sweep away the whole system of District Courts, which had become very odious to the bar and people of Missouri. Accordingly provision was made for taking cases, by writ of error or appeal, directly from the Circuit Court to the Supreme Court. Now, this had always been done in St. Louis, for there the District Court had never existed. Hence, St. Louis was not within the remedy, as it was not subject to the evil for which this act was intended. The

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title of the act of February 28, 1871, was: "An act to provide for appeal and writs of error in civil cases, and concerning practice in the Supreme Court, and repealing chapter 135 of the General Statutes, and an act entitled 'An act to amend section 9 of chapter 172 of title 34 of the General Statutes of Missouri, concerning practice in civil cases,' approved January 24, 1868."

Turning to the acts repealed, we find that chapter 135 concerned practice in the District Courts. These being abolished by constitutional amendment, the act regulating practice in them was mere rubbish, and was thus swept away. The same remark applies to the act to amend section 9 of chapter 172 of title 34, General Statutes. All the rest of the act was directed to the practice in the Supreme Court, and to taking cases there by writ of error or appeal from *final judgments* rendered by the Circuit Courts, and only in the case of final judgments. The examination of the meaning of this term, however, is unnecessary. What we have to remark here is that this act had no relation to the practice in the St. Louis Circuit Court, where the special and general terms were still existing, as well as the practice in respect of them provided by the act of 1869. No more than a glance is necessary to prove this. If the construction contended for by appellant's counsel were sound, an appeal would have lain directly, at any time after February 28, 1871, from a final judgment in the St. Louis Circuit Court, at special term, to the Supreme Court. In other words, that act would have abolished the general term, which it could only have done by repealing the 15th section of Article 6 of the Constitution.

This is one answer, and we presume a sufficient one, to the suggestion that the act of February 28, 1871, repealed the act of February 25, 1869, in respect of such appeals as are the subject of that last-named act. It was in the most express terms provided that "no appeal provided for in this section" should be allowed, except under certain enu-

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merated conditions, which it is conceded were not complied with here. Among the appeals thus provided for, were those "from any judgment rendered * * * at general term reversing * * * a judgment rendered * * * at special term." Such is undeniably the nature of the "judgment rendered at special term" which is now under examination, and, unless words have lost their meaning, the Circuit Court at general term had no power or jurisdiction to allow an appeal from such a judgment except in the manner provided by law. All other appeals were expressly forbidden.

The argument seems to us to be complete; but there is further confirmation of it drawn from the terms of the act of 1869 itself. The point made by the counsel moving for a rehearing is that the judgment of reversal rendered in this case by the general term was a "final judgment." We are aware that the Supreme Court has given an interpretation to the term, as used in the acts of 1865 and 1871, which may include judgments of reversal and remander. But both the rule and the reason of that interpretation fail of application to a statute which is careful to discriminate between "final judgments" and "judgments not final," and which expressly places judgments of reversal and remander in the latter category. The act of February 25, 1869, provides (sec. 2) for appeals "from an award of a new trial, and from any judgment rendered or decree or order made at general term, reversing or modifying a judgment rendered or decree or order made at special term, *in the same manner and with the like effect as provided for by law in respect to* [*of*] *appeals from final judgments rendered by the said court at general term.*" What is this but declaring that such judgments at general term, reversing, etc., are not "*final judgments,*" though they are, in respect of direct appeals to the Supreme Court, treated as if they were such? Here is an interpretation of the act "*ex visceribus statuti,*" which Lord Coke tells us, is "*optima interpretatio,*" or, in the words

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of Chief Justice Marshall, "Every statute is its own best interpreter." We have no occasion to resort to other familiar rules for construing statutes and ascertaining their meaning. Our Supreme Court has, indeed, frequently declared, and in so doing has but observed the injunction contained in every recent revision of our laws (Rev. Code, 1845, p. 699, sec. 22; Rev. Code, 1855, p. 1027, sec. 23; Wag. Stat. 1872, p. 897, sec. 6), that a special statute will not be construed to be repealed by a general act, and that, in any case, the repugnancy must be plain before the presumption of a repeal by implication will be indulged. *Finney* v. *Brant*, 19 Mo. 42; *Dunscomb* v. *Maddox*, 21 Mo. 144; *Mauro* v. *Buffington*, 26 Mo, 184; *State* v. *Macon County Court*, 41 Mo. 453; *State* v. *Judge of St. Louis Probate Court*, 38 Mo. 529; *State* v. *Draper*, 47 Mo. 29; *St. Louis* v. *Ind. Insurance Company, of Massachusetts*, 47 Mo. 146. We might invoke this rule of constuction, we think, with confidence, except that in our view of the matter neither the act of February 25, 1869, nor that of February 28, 1871, is general—that is, neither professes to apply to the whole State of Missouri. The first proclaims its limited scope on its face and in its title. It is confined in terms to St. Louis alone. The other respects all the counties of the State *except* St. Louis. Its meaning and limitation in this particular are somewhat less obvious, but equally unequivocal when carefully examined.

Whether the Supreme Court has in any instance taken cognizance of a case purporting to be brought before it by appeal from such a judgment of the St. Louis Circuit Court at general term as this record discloses, where the statutory prerequisites of such an appeal have been disregarded, we are not called on to determine. We are pretty sure, from an examination of all the cases cited, that the point now before us has never been brought to the attention of the Supreme Court. Therefore, even if it should appear that the Supreme Court had in any case accepted the submission

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of a cause, after full argument by zealous and able counsel, in which the appeal had not been taken in conformity with the act of February 25, 1869, we should attach no sort of importance to a fact the influence of which on the decision of the court was thus disproved. If both parties acquiesced in the regularity of the appeal—if neither made any question on it—nothing would be more natural than that the defect, *though it really goes to the jurisdiction of the appellate court*, should escape its notice.

No other matter seems to require remark in the motion and reasons for a rehearing, and the motion is accordingly overruled, all the judges concurring.

John J. McMenamy *et al.*, Respondents, *v.* James Cohick *et al.*, Appellants.

March 21, 1876.

1. A person not in actual possession when the trespass was committed cannot maintain an action for trespass on real estate.
2. It is error to instruct a jury as to exemplary damages where there is no evidence of malice or oppression.
3. In an action by a married woman and her husband for trespass to realty, an answer filed by the trustee of the separate estate of the plaintiff, in another proceeding for possession of the same premises, is not competent evidence for plaintiff.

Appeal from St. Louis Circuit Court.

Reversed and remanded.

M. Kinealy, for respondent, cited: Carpenter *v.* Barber, 44 Vt. 446, 448; Conrad *v.* Janfee Ins. Co., 6 Pet. 268; Druse *v.* Wheeler, 22 Mich. 444; Stark. on Ev. 813; Stewart *v.* Ball, 33 Mo. 156; Boal *v.* Morgner, 46 Mo. 50; Ontiatt *v.* Ludlow, 32 N. J. 239; Clark and wife *v.* Gillet, Law Reg., Jan. 1874, p. 20; Steel *v.* Johnson, 4 Allen (Mass.), 425; Robinson *v.* Robinson, 44 Ala. 227; Cullen *v.* Kelsey, 39 Me. 299; Carpenter *v.* Barber, 44 Vt. 449;

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Sigerson *v.* Homsly, 14 Mo. 74; Cook *v.* Hacksburn, 45 Mo. 317; Carter *v.* Alkire, 48 Mo. 302; Add. on Torts, 245; 1 Wag. Stat. 495, sec. 26; Hill. on Torts, 101, 104; Goets *v.* Ames, 27 Mo. 28; Wells *v.* Sawyer, 21 Mo. 357; Perkins *v.* Lowe, 43 N. H. 220; 1 Smith's Ld. Cas. 256; Alred *v.* Bray, 41 Mo. 484; McManus *v.* Lee, 43 Mo. 206.

Cline, Jamison & Day, for appellants, cited: Rogers *v.* White, 1 Sneed, 68; 4 Allen (Mass.), 425; 6 N. Y. 342; 32 N. J. 239; Taunton *v.* Costar, 7 Durnf. & E. 255; Turner *v.* Meymott, 1 Bing. 158; Harney *v.* Brydges *et al.*, 14 M. & W. 437; 2 Greenl. on Ev., sec. 625; Sampson *v.* Henry, 13 Pick. (Mass.) 36; Hyatt *v.* Wood, 4 Johns. 150; Reed *v.* Price, 30 Mo. 442, 446; Hampton *v.* Fowler, 54 N. H. 197; 1 Dev. & B. (N. C.) 324; Eaton's Admr. *v.* Perry, 29 Mo. 96.

Bakewell, J., delivered the opinion of the court.

The petition in this case states that the plaintiff Louisa is a married woman living with her husband; that on November 27, 1872, she was in actual occupation of a farm described in the petition, as *cestui que trust* in a certain deed executed October 30, 1871, by which the premises were conveyed to A. J. P. Garesché, in trust, for the sole and separate use of said Louisa; that defendants, contriving to harrass and oppress her, on said November 27th wrongfully entered upon the premises described in the deed, made a disturbance, broke open the doors, injured the furniture belonging to her, "maliciously left a portion of said premises occupied by dissolute ruffians—in a filthy and untenantable condition," by means of which she and her family were put in fear of their lives, and assaulted with deadly weapons, and she was disturbed in her peaceable possession of said premises, and compelled to come to St. Louis for legal advice, and put to great cost and expense, to her damage $5,000, for which she asks judgment.

Defendants deny all these allegations, except those as to the marriage of plaintiffs and their cohabition, and say that,

at the date of the alleged trespass, defendant Cohick owned, and was entitled to the possession of, the premises, and had been placed in peaceable possession of a portion of them, and was, at the date of the alleged trespass, forcibly evicted from them by plaintiff Louisa and others.

Plaintiffs reply, denying the statements of the answer. The instructions given and refused are set out below, as far as is necessary for the purposes of this opinion. There was a verdict and judgment for plaintiffs for $1,450. A *remittitur* was entered, reducing the judgment to $500. A motion for a new trial was overruled, and, all exceptions being saved, the cause is brought to this court by appeal.

The testimony is voluminous. It appears that, on May 16, 1870, the plaintiffs gave a deed of trust upon the premises upon which the trespass is said to have been committed, to secure a note of plaintiff John McMenamy for $14,000. Next year they conveyed the same premises, subject to this deed of trust, to Gareschė, as trustee, for the separate use of plaintiff Louisa. On November 6, 1872, the deed of trust was foreclosed, and defendant Cohick purchased the premises for $20,000, at the sale of foreclosure, and received a deed from the trustee for the same. Cohick then purchased about $600 worth of stock and house furniture from John McMenamy, and, with John McMenamy's consent, Cohick put his servant, defendant Walter, into the house to take possession of it, McMenamy reserving two rooms for himself and family until he should move, into which his furniture was moved, and giving up the keys of the house. Cohick was also put into possession of a cabin adjoining the house, and of the farm, and began changing fencing and making repairs about the premises without any opposition at the time from the plaintiff Louisa. Mrs. McMenamy went to town for legal advice, and, on her return, her husband not being in the house, with the help of her brother and others, she turned Walter out of the house, and threw his bed and some other furniture of Cohick's out

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after him. She then locked up the house; and her husband, together with Walter and some other persons, apparently farm hands occupying the cabin near the house, in the employ of Cohick, made a good deal of disturbance outside the house during the night, most of them being drunk; plaintiff John appears to have been especially drunk and disorderly, and to have endeavored to force his way into the house, and to have used insulting language to his wife. Defendant Cohick was not well; he came there when he heard his servant had been ejected, but made no disturbance, and directed his men to keep order and do nothing to annoy Mrs. McMenamy.

There is some evidence that a gun was fired during the night, but this is contradicted. It is clear that the men outside, or some of them, got drunk and were noisy and quarrelsome among themselves. It does not appear that any rough or insulting language was addressed to Mrs. McMenamy, except, according to Mrs. McMenamy, by one man, and, according to another witness, by her husband, who was shown by plaintiffs, against the objection of defendants, to be a man of drunken habits. The witnesses for plaintiffs and defendants do not agree. Plaintiff Louisa swears that there was very great noise and tumult outside during the night, and much violent and profane language used, so as to keep the inmates of the house awake, and that guns and pistols were discharged. As to the discharge of fire-arms she is not corroborated, and there is testimony that the men outside had no guns or weapons of any sort. Defendant Cohick came there with a gun on his shoulder, but the testimony is that it was not loaded, and he went away before the drinking and disturbance began. This is, perhaps, as fair a statement of the whole testimony as can be made in so condensed a shape, and the occurrences are certainly painted in much darker colors by Mrs. McMenamy herself; but, substantially, the circumstances seem to have been as just detailed. There was quite a scuffle over the

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ejectment of defendant Walter, who was forced out of the house by one or two young men, and he had a knife in his hand, which he says was a pocket pruning-knife, which was lying open by his side when he was ordered out of the house. He does not seem to have used any violence, either of gesture or language, but refused to go out until ejected by force, saying that he was there by the order of his employer, the defendant Cohick, and must stay till directed by him to leave. Mrs. McMenamy also swears that on her return from town, on the day Cohick was put in possession of the house by her husband, she found her husband stupidly drunk, and two or three men, apparently farm hands of Cohick's, lounging about the house, one of them drunk, and the furniture strewed about and in confusion. There is no evidence that the premises were injured by defendants, or either of them; nor is any actual damage shown, except that Mrs. McMenamy was permitted to prove, against the objection of defendants, that she incurred expense and loss of time in traveling from Bridgeton to St. Louis to consult an attorney.

At the close of plaintiffs' case, defendants asked an instruction that plaintiffs were not entitled to recover, which was refused.

The only instruction given was the following, at the instance of plaintiff:

"If the jury find for the plaintiff, they should assess her damages at the value of the property injured and destroyed by the defendants, and the actual expense she was put to in order to get rid of the intruders; and in addition thereto, if they further find that the trespass was committed in a wanton, rude, and aggravating manner, indicating malice or a desire to injure the plaintiff, they may allow such further sum for exemplary damages or smart-money as, under all the facts and circumstances of the case, they may deem right, not exceeding the amount claimed in the petition."

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The court refused an instruction asked by the defendants, to the effect that, if the defendant Cohick acquired the title to the property in question before the alleged acts of trespass, then the plaintiffs could not recover against him; and another instruction was asked, that the plaintiff could not recover against Walter if Cohick held the right to the property, and Walter was simply acting at the request and as the servant of Cohick in the commission of the alleged acts of trespass.

The following instructions, asked by the defendants, were also refused:

1. "The jury are instructed that, if you believe from the evidence in this case that the plaintiff Louisa McMenamy was a married woman living with her husband, the plaintiff John J. McMenamy, on the premises described in the petition, and that the said John J. McMenamy gave to the defendant James Cohick permission to take possession of such portion of the premises described in the petition as the acts complained of in the petition were committed on, and that the defendants entered on said premises and committed said acts alleged by reason of the permission aforesaid, then the plaintiffs are not entitled to recover."

2. "The jury are instructed that, if you find for the plaintiffs in this case, then you are instructed that the plaintiffs are entitled to recover only such damages as you may believe from the evidence that the plaintiffs have actually received to the property and buildings described in the petition; and if you believe from the evidence that, at the time of the commission of the acts alleged in the petition, the defendant James Cohick was owner and entitled to the possession of the property described in the petition, then you are to take that fact into consideration in assessing the amount of damage."

To the giving of these instructions defendants excepted.

So far as this was an action to recover damages for an ille-

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gal entry upon, or an immediate injury to, real property corporeal, in the possession of the plaintiffs, or of the plaintiff Louisa, there was nothing whatever to support the verdict.

Even the person having the legal title cannot maintain an action for trespass to realty unless he was in actual possession when the trespass was committed. In the case at bar, there is no pretense that either of the plaintiffs had the legal title, and even the beneficial title of plaintiff Louisa seems to have been divested, and one of the defendants was the owner of the realty on which the trespass is alleged to have been committed, under a deed from herself and her husband, at the time of the alleged wrong. As to possession, it appears that had been delivered to defendant Cohick by plaintiff John McMenamy; and there could be no trespass in entering peaceably into a dwelling-house occupied by husband and wife, at the invitation of the husband, in the absence of the wife, as in the case at bar.

So far as this was an action for damage to personal property, there was no evidence of any damage done to any personal property of either of the plaintiffs. There was no evidence of any personal property owned by plaintiff Louisa, and no actual damage whatever was proved. There is no evidence of the value of the time of plaintiff Louisa consumed in going to the city, nor what her expenses were, nor does it appear that this loss of time was a matter for which defendants were responsible.

This was not a case for vindictive or exemplary damages.

Defendant Cohick was absent on every occasion of disturbance, both when plaintiff Louisa forcibly thrust his servant and co-defendant out of the house, and when the plaintiff John got drunk and used violent language to plaintiff Louisa and tried to force his way into the house. Both Cohick and Walter seem to have been studious to avoid any injury or insult to person or property. The noise during the night was mainly occasioned by plaintiff John McMenamy, who was a party to sending for the liquor

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on which he and the laborers on the place got drunk together, and it was he that used insulting language to his wife, the co-plaintiff.

The court erred in giving the instruction asked for plaintiff as to the measure of damages, for there was no evidence to warrant it. The evidence shows that defendant Cohick was, with his servants, in peaceable possession of the out-buildings of a farm which had formerly been owned by plaintiff John, which John had conveyed to the trustee of his co-plaintiff, Louisa, and which Cohick had purchased at the sale of the premises, on the foreclosure of a deed of trust executed by both the plaintiffs, and that Cohick was, with his servants, cultivating and making repairs and changes on the place, as owner, and with the knowledge, and apparently with the acquiescence, of both the plaintiffs; that he then was put into peaceable possession of a portion of the dwelling on the farm, in which plaintiff John McMenamy, his wife, plaintiff Louisa, and their family were residing; that Cohick entered, and put his servants into certain rooms in this house, at the invitation of plaintiff John McMenamy. There is no rudeness, malice, or desire to injure plaintiffs, or either of them, shown by anything said or done by either defendant; any disturbance that arose was contrary to Cohick's instructions, took place in his absence, and was occasioned by the forcible eviction of defendants from premises into the peaceful possession of which they had been put by plaintiff Louisa's husband, and was a direct consequence of the violent act of the plaintiff Mrs. McMenamy in driving Cohick's employés from the house, and keeping them locked out all night in the company of her husband and co-plaintiff, who got drunk with them, and seems to have been the ringleader in any disturbance on the outside of the house during the night. Sympathy is readily aroused for the sufferings of an honest mother of a family struggling with the manifold miseries inflicted upon her by the debaucheries of a drunken husband, but those sym-

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pathies must not be allowed to find relief by a violation of rules of law. That a husband should with drunken companions offer rudeness to his wife, and then join his wife as co-plaintiff to recover exemplary damages for the wrongs he had instigated, and to which he was a party, would seem an anomaly; but in this case, whilst the husband seems to have been the chief wrong-doer so far as any rudeness or noise in and around his dwelling-house goes—was the sole wrong-doer as to any direct insult to his wife—it appears that defendant Cohick was not a companion of the drunken frolic, and it does not appear that defendant Walter was guilty of any rudeness in word or deed.

The court erred, also, in permitting the answer of Gareschè, trustee, filed November 20, 1872, in an ejectment suit of *Cohick* v. *McMenamy*, for the possession of the premises in question, to be read. This answer was filed three days after the alleged trespass. The only object for its introduction must have been to create the impression that defendant Cohick did not really own the property, as that was the tenor of the averments in the answer. But these averments were not competent evidence.

The deed of the trustee of plaintiffs to defendant Cohick, for the premises on which the alleged trespass was committed, was properly admitted, as also the deed from plaintiffs to that trustee. They were in mitigation of damages, and the court having refused to declare that plaintiffs were not entitled to recover, it was quite competent for defendant Cohick to show that he claimed title to the property under a deed from plaintiffs and for defendant Walter to show that he was in the employ of Cohick, acting under his instructions. Indeed, no exception is saved to the introduction of the latter deed, as the record does not state the ground of the objection made.

From what has been said, it is plain that we think the court erred in refusing the instruction asked by defendants at the close of plaintiffs' case.

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If there is any evidence, it is error to take the case from the jury, but here we see no evidence of actual damage, and it is clear that there were no circumstances of malice and oppression which would warrant a verdict to punish the defendants. For the reasons given, the verdict and judgment in the cause must be reversed and the cause remanded. The other judges concur.

ARCHIMEDES J. BUCKNER, Respondent, *v.* ISAAC E. JONES, Appellant.

March 21, 1876.

1. One taking the check of a third party under circumstances that would lead a man of ordinary prudence to suspect that the holder had no right to pledge it, or to pay it out for his own indebtedness, is bound to inquiry; and if, under such circumstances, he advanced money to the holder upon the check, or applies the same to the liquidation of an existing indebtedness of the holder, he will be held to refund the proceeds of the check in his hands to the owner.
2. It is not error to refuse to instruct that the evidence as to any material fact, in order to a recovery, must preponderate in favor of plaintiff.

APPEAL from St. Louis Circuit Court.

Affirmed.

George P. Doan, for appellant, cited: 1 Pars. on Bills (ed. 1865), 258, 278; 2 Pars. on Bills, 42, 43, 44; Bayley on Bills (ed. 1836), 104, and note 12; Goodman *v.* Simonds, 20 Haw. 343; Tuntal *v.* Barandon, 8 Taun. 100, affirming Collins *v.* Martin, 1 Bos. & Pul. 648; Fox on Con., 122; 2 Saunders on Pl. (ed. 1837) 670, 672, 673; 1 Stephen's N. P. 332, side page 333; Bay *v.* Coddington, 5 Johns. Ch. 54; Morrison *v.* McCartney, 30 Mo. 183; Lester *v.* Guion, 8 Bush (Ky.), 357; Pacific Law Rep., March 5, 1872; Peacock *v.* Rhodes, Dougl. (Mich.) 611, 633; Cook *v.* Jadis, 5 B. & Ad. 909.

Matthew O'Reilly, for respondent.

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BAKEWELL, J., delivered the opinion of the court.

Plaintiff sues for $295, which he says that defendant received for plaintiff, and to his use, on October 8, 1870.

Defendant, in his answer, says that at the last-named date he was a member of the firm of Jones & Sibley; that at that date one Bingham owed Jones & Sibley $220.73, and at that date borrowed from Jones & Sibley a sum of money, and, in consideration of said previous indebtedness and the money then loaned, did then and there indorse and deliver to Jones & Sibley a certified check for $601.73, drawn by plaintiff upon a bank in Philadelphia, payable to Bingham's order; that, at the time of the delivery of this check and afterwards, Jones & Sibley advanced to Bingham $35, and also paid $40 to a creditor of Bingham, at his request; that these sums amounting altogether to $295, Jones & Sibley, on October 13, 1870, paid the balance ($306) to said Bingham. Defendant denies that he owes plaintiff anything, and says that the money sued for herein is the $295 retained by Jones & Sibley, as stated, from the proceeds of the certified check.

Plaintiff replies that, at the time Jones & Sibley received the certified check, and before they advanced or paid any money to Bingham or on his account, as stated, they well knew that the check was received and held by Bingham as the agent of plaintiff, with instructions to use the same for the benefit of plaintiff.

There was evidence tending to show that Bingham was an impecunious man, of drinking habits; that he was a sort of real estate broker, so far as he had any business at all; that he had no regular office, but used a desk in the drug store of Jones & Sibley for such business as he occasionally transacted; that about October 8th, in the presence of Jones, he received from plaintiff, by mail, a certified check for $601.73 to pay some taxes, accompanied by a letter of instructions; that at that time he owed Jones & Sibley $220 for money borrowed, in part, and partly for money of

theirs which he had converted to his own use without their permission; that they knew that he was not likely to have, or be intrusted with, large sums of money; that they had known him and his habits and impecunious condition for a year or two, at least, and regarded him as a person whose acquaintance, for these reasons, it was desirable to be rid of; that, on receiving this check, the banks refusing to cash it for him, he desired Jones to loan him $25, to which Jones replied that he would lend him nothing until he paid or secured what he owed already; that Bingham then handed to Jones the check, and afterwards, at Jones' request, indorsed it, and then received $25 from Jones; that afterwards Jones lent him $10 or $15 more, and paid a note of Bingham for $40, which Jones & Sibley had indorsed; that Jones & Sibley afterwards paid to Bingham $306, and retained the remainder of the sum represented by the check, $295, alleging that it was due to them by Bingham. There was also evidence that Bingham had an interest in the check of about $25, for services or commissions. There was a verdict and judgment for plaintiff for $312.42, and, a motion for a new trial being overruled, the cause is brought to this court by appeal.

The following instruction was given at the instance of defendant:

"The jury are instructed that the check read in evidence was a negotiable instrument, and is transferable by indorsement and delivery. If the jury believe from the evidence that plaintiff made said check payable to David S. Bingham or order, and said Bingham indorsed and delivered the check to defendant for a valuable consideration (and a preëxisting debt and money advanced are a valuable consideration), then plaintiff cannot recover, unless they also believe that, at the time Bingham so indorsed and delivered the same to defendant, defendant knew the same was not the property of Bingham, and took the same knowing it was in possession of Bingham as agent of another."

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The court, of its own motion, instructed the jury as follows:

"Although the jury may believe from the evidence that, at the time when Bingham delivered the check to the defendant, he was indebted to the firm of which defendant was a member, yet if they further believe that, at the time of the delivery of the check, the defendant knew or had reasonable cause to believe that Bingham did not hold the check except as agent of the plaintiff, and did not himself own the check, then the jury will find for plaintiff, less the amount advanced by defendant to Bingham at the time the check was given to defendant."

The following instructions, asked by defendant, were refused:

1. "The jury are instructed that, when there is conflicting testimony as to any material fact in the cause, to entitle the plaintiff to a verdict upon such facts, the evidence must preponderate in favor of plaintiff."

2. "The jury are instructed that the check read in evidence is what is called a certified check, and is an appropriation of so much money of the depositor as is represented by the check, and such depositor ceases to have any property in, or any control of, the money so represented by said check; and such money, so represented, becomes the property of any legal holder of such check. If the jury believe that plaintiff drew said check dated October 3, 1870, for $601.73, payable to David S. Bingham or order, and said Bingham indorsed and delivered said check so certified to said defendant, for a valuable consideration, without fraud or collusion on the part of said defendant, then the jury will find for defendant."

To the refusal of this last instruction, and the giving of the instruction given by the court of its own motion, the defendant excepted.

There was no error in refusing the second instruction asked by defendant and refused. The law applicable to the case was declared in the two instructions given, in a

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manner to leave defendant no room for complaint. A vague declaration that the defendant could only be liable in case fraud or collusion on his part was shown, could have had no other effect than to confuse or mislead. The first instruction asked by defendant was also correctly refused. It gave no practical rule for the guidance of the jury. It did not attempt to define the character and amount of testimony necessary to base a verdict upon; and, had it done so, it could not have been given. The jury are the sole judges of the weight of the evidence, and no man competent to sit on a jury need be told that his verdict must be founded upon the evidence in the case, or instructed in a general way that he must not find against the weight of the evidence.

The counsel of appellant seems to labor under the impression that because the check was negotiable therefore an absolute title passed necessarily by indorsement and delivery. This is not the law. If defendant had received a $1,000 bank bill under circumstances such as to put him on his guard, and lead him, as a reasonable man, to suspect that it could not be honestly pledged or paid away for his own benefit by the person presenting it to him, he would not have been safe in advancing money upon it, nor could he be allowed to apply a portion of it to the payment of a debt due to him by the suspected holder. The check in the case at bar did not belong to Bingham, and there is evidence from which the jury might fairly infer that defendant knew the fact, or would have known it had he not willfully closed his eyes lest he should plainly see the whole truth—which, for the purposes of this case, is just the same thing. He, clearly, had no right whatever to take the money of plaintiff, under these circumstances, to reimburse himself for a pre-existing debt of Bingham to the firm of which defendant was a member.

There is no error in the record to warrant a reversal. The judgment of the Circuit Court is affirmed. The other judges concur.

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THE STATE OF MISSOURI, *ex rel.* CHARLES GIBSON, Relator, v. JUDGE OF ST. LOUIS CIRCUIT COURT, Respondent.

March 30, 1876.

1. *Mandamus* is not the proper remedy for the correction of a judicial error.
2. An alternative writ of *mandamus*, to compel a trial court to enter final judgment in accordance with the mandate of an appellate court, will not be granted where the record does not disclose what the mandate of the appellate court was.

APPLICATION for *mandamus.*

Writ denied.

A. J. P. Garesché, for relator, cited: Bryan *v.* Smith, 16 Mo. 322; Leeches & Neenan *v.* Dugdale, 41 Mo. 318; Franz *v.* Dietrich, 49 Mo. 95; Hurck *v.* Erskine, 50 Mo. 119; Young *v.* Frost, 1 Md. 397; Biscoe *v.* Tucker, 14 Ark. 522; Minor *v.* Medbury, 7 Wis. 100.

GANTT, P. J., delivered the opinion of the court.

We are asked in this case to award against the judge of the St. Louis Circuit Court, presiding in room No. 1, an alternative writ, ordering him to show cause why he should not be directed to enter final judgment in favor of the relator, in a cause pending before him on exceptions to the final settlement of Charles Gibson, executor of Hamilton R. Gamble.

The record of the cause is not brought before us, but we are told in the petition for the writ that, after a trial in the Probate Court, judgment against the relator, and appeal to the Circuit Court, the cause was tried at great cost of time and money; that the Circuit Court decided against the relator; that he thereupon appealed to the Supreme Court, which reversed the judgment. The particulars of its action do not appear. The language employed by the relator is, "and thereupon the said Supreme Court reversed and remanded said cause to said Circuit Court."

We are then told that, upon the cause being thus remanded, the relator moved the Circuit Court to enter

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final judgment in conformity with the mandate of the Supreme Court, but the Circuit Court overruled the motion, and relator excepted; and thereupon the Circuit Court again referred the case to a referee, to hear evidence and make a report upon which the Circuit Court may proceed to render final judgment.

The relator alleges that such reference will be productive of loss of time and waste of money, and that the duty of the Circuit Court is "to enter judgment in conformity with the mandate from said Supreme Court, and as moved by the relator." Upon this showing, the relator asks for the writ indicated in the first lines of this statement.

We are very clear that the writ must be denied. Let it be imagined that it were issued, and that the judge of the St. Louis Circuit Court should return that he had complied with the mandate of the Supreme Court by making the order of which the relator complains; would we have any means of knowing whether that order was indeed a compliance with the mandate? We certainly would have no such means. All that we know, with the least approach (and it is only an approximation) to accuracy, is that the Supreme Court has reversed and remanded the cause for further proceedings in the Circuit Court. It would be a strange departure from the rule which enjoins the utmost precision of statement when an extraordinary writ is asked for, to grant such a remedy upon allegations like this. If it be said that, an alternative writ being granted, all the merits of the matter will appear by the return made to it, the answer is that such merits should appear in the first instance. Besides, suppose the judge should decline to show cause altogether, we would have nothing but conjecture to warrant the issue of a peremptory writ, yet the obvious dictate of propriety is that an alternative writ should not be granted until and unless it is made to appear that the applicant is entitled to it, unless cause be shown to the contrary.

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2. According to the most probable opinion we can form, the matter to be decided and the course to be pursued by the Circuit Court, in the cause to which the relator is a party, will depend on the determination of a judicial question. Even if the record be in the same or an analogous condition with that which existed in the case of *Hurck* v. *Erskine* et al., when it was decided in 45 Mo. 484, the question as to the proper action of the Circuit Court in the remanding of the cause is, unequivocally, a judicial one. It was so in that case. A motion for final judgment made in the Supreme Court, in that cause, at the March term, 1870, directly upon the delivery of the opinion of the court reversing the judgment and remanding the cause, was considered and overruled; and when the cause reached the Circuit Court, with the mandate of the Supreme Court, not only did the judge presiding in room No. 1 compel the parties to try the cause anew, but the judges of the court in general term were unanimous in approving his action. We certainly have no warrant for supposing that the record in the case to which the relator is a party presents a question as free from doubt as that which was decided in 45 Mo. 484, and 50 Mo. 116, for we do not see the first-named record at all, and have no means of which we can take judicial cognizance of estimating its tenor; but, if it were before us and were entirely similar, we should be compelled to refuse the writ of *mandamus*. It is not the appropriate mode of correcting judicial error. Other means exist for this purpose, and to them the relator must resort. See High on Rem., sec. 10 and following, and cases there cited. We are told that the relator will be annoyed, and that large costs will be incurred by the prolongation of this litigation beyond its necessary limits. This is, of course, an evil, but we cannot for that reason apply a remedy which the law does not sanction. It is consoling to reflect that the large costs anticipated by the relator must fall on the party who is in the wrong. For ourselves, however,

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we must decline to arrest by writ of *mandamus* judicial action which one of the parties considers erroneous. Judge BAKEWELL does not take part in this cause, having been of counsel in a matter connected with the principal case. Judge LEWIS concurs.

WILLIAM GALWAY *et al.*, Respondents, *v.* ABRAHAM SHIELDS, Appellant.

April 10, 1876.

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1. A demurrer to an answer will be sustained where the answer shows a defense which is void under the statute of frauds.
2. Partial or total payment of the consideration is not such a performance as will take a contract out of the operation of the statute of frauds.
3. It is proper to treat a defendant liable simply for goods sold and delivered, though it appears in evidence that there was a condition of defeasance to the sale of which he did not avail himself.

APPEAL from St. Louis Circuit Court.

Affirmed.

Gottschalk, for appellant, cited: Rabruhl *v.* Lark, 35 Mo. 316; Gist *v.* Eubach, 29 Mo. 248; 2 Mo. 126; 11 Mo. 659; Gardner *v.* Armstrong, 31 Mo. 535; Self *v.* Cordell, 45 Mo. 345; Kratz *v.* Stocke, 42 Mo. 354; Mincke *v.* Skinner, 44 Mo. 92.

Finkelnburg & Rassieur, for respondents, cited: Ells *v.* Pacific R. R. Co., 51 Mo. 204; Charpiot *v.* Sigerson, 25 Mo. 63; Dickerson *v.* Chrisman, 28 Mo. 140; Story Eq. Pl. 761; Beare *v.* Vallé, 2 Mo. 109; Chambers *v.* Lecompte, 9 Mo. 569; Johnson *v.* McGruder, 15 Mo. 369; Tibeau *v.* Tibeau, 19 Mo. 78; Depain *v.* Carter, 21 Mo. 331; White *v.* Watkins, 23 Mo. 423, 428; Young *v.* Montgomery, 28 Mo. 604; Price *v.* Hart, 29 Mo. 171; Tatum *v.* Brookes, 51 Mo. 148; Bowles *v.* Watkins, 54 Mo. 262; Kratz *v.* Stocke, 42 Mo. 351; Park *v.* Leewright, 20 Mo. 85.

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GANTT, P. J., delivered the opinion of the court.

Galway & Semple sued Shields to the October term, 1874, of the St. Louis Circuit Court, for goods sold and delivered, the amount of which was alleged to be $4,195.59.

The defendant denied the sale and delivery, and alleged that plaintiffs and defendant had made an agreement in writing, which he produced, by virtue of which they were to furnish him with the stoves and castings therein named, which defendant was to sell, and settle on the first of each month, for the articles sold during the previous month, by giving his note at ninety days; that, if at any time defendant should elect, he should be at liberty to give up the stove business and return to plaintiffs all the unsold stoves and castings of their manufacture, at the prices charged; that goods were shipped to defendant pursuant to this agreement, but that they were badly packed, by means of which breakage occurred, and defendant had paid $55 in repairs; that afterwards plaintiffs and defendant entered into a verbal agreement by virtue of which defendant was to convey to plaintiffs certain real estate in the city of St. Louis, at a given valuation, in payment of so much money ($4,045), but that plaintiffs have broken this verbal contract, though defendant has tendered a deed of said real estate. Defendant also stated that plaintiffs were indebted to him "in the sum of $110.75, for money paid for them, at their request, for services rendered, money paid for their use, merchandise, and error in bill of plaintiffs, all of which will more fully appear by a *specified* account herewith filed," etc.

Plaintiffs demurred to so much of the answer as set up the verbal contract to receive land; and this demurrer was sustained.

There was a reply denying the allegation of breakage, and denying the indebtedness of $110.75, or any of it, alleged in the answer.

The cause was tried by the court sitting as a jury, on

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December 28, 1874, and judgment was given for $4,307.43, less $53.58—$4,253.85.

By the bill of exceptions it appeared that such an agreement as defendant set up had been made between the parties; that goods had been sent to the defendant by plaintiffs in pursuance of it, to the amount of $4.195, and that plaintiffs (who were the only witnesses) admitted the set-off or credit of $53.58.

Defendant moved for a new trial, assigning as reasons therefor:

1. That the court had sustained plaintiffs' demurrer, and had refused to permit him to give evidence to sustain the answer thus demurred to.

2. Because the court admitted improper, and excluded proper, evidence; and because the verdict was for the wrong party.

The court overruled this motion, and, the judgment being affirmed in general term, the case is before us on appeal.

Three points are made before us, viz.:

1. That plaintiffs could not avail themselves of the statute of frauds by demurrer, but were bound to plead it.

2. That the answer alleged that the contract was to buy stoves and pay for them in land; that this contract was fully executed, and that, therefore, plaintiffs could not interpose the defense of the statute of frauds.

3. That the contract in writing and admitted by the pleadings was a different contract from that on which plaintiffs sued, and that the evidence offered was not admissible under the special contract.

In aid of the first two points made, the appellants urge that the answer shows a contract, verbal indeed, but performed; and that, being performed, it is taken out of the operation of the statute for the prevention of frauds and perjuries.

1. We see without difficulty that, notwithstanding what is

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alleged respecting performance, nothing has been done to distinguish the case from those in which it has been declared that the mere payment of money will not have the effect of doing away with the necessity of a written memorandum of a contract. It was formerly held that the payment, or the partial payment, of the consideration for such a contract took the case out of the statute. *Owen* v. *Davis*, 1 Ves. sr. 82; *Lacon* v. *Mertins*, 3 Atk. 4; *Clinan* v. *Cooke*, 1 Sch. & Lef. 40. But these decisions have been abandoned as unsound—as manifestations of a wish on the part of courts of equity to prevent the doing of injustice in a particular case, under the protection of a general statute, rather than as the true and tenable construction of an act intended to apply to a large class of cases. The operation of such a statute must almost necessarily work partial hardship in some instances. The same may, however, be said of the law of gravitation, and courts of justice have of late years wisely and decidedly disapproved of all judicial legislation directed to the relief of exceptional inconveniences. The point may be considered as settled that payment is not performance, or part performance, so as to take the case out of the scope of the statute of frauds. Such was the opinion of the greatest master of the learning on this subject who has in this century borne the great seal of Great Britain (Sugden on Vend. 101, Eng. ed. of 1852), and of Mr. Justice Story (1 Eq. Jur., secs. 760, 761). The cases cited by these great commentators illustrate and justify their conclusions. We need not cite them, but will quote the authority of Chancellor Kent to the same effect. 4 Kent's Com. (ed. 1867) 520. We may add, however, that in the 7th American, from the 11th English, edition of Sugden's Vendors and Purchasers, which is not the last English edition of this great work, occurs, at page 168, section 14, the admirable comment of this learned and discerning man on the attempt to make payment such part performance of a contract as would avoid the statute, to

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which Judge Story refers in his notes to section 760, above quoted.

2. Then, is it necessary to plead the statute of frauds if a party would invoke its protection? The rule undoubtedly was, and perhaps still is, that if a declaration or petition sets forth a promise which the statute of frauds declares to be invalid if not in writing and signed by the party to be charged with it, without stating whether or not the contract be thus written and signed, the want of such writing and signature must be shown by plea or answer, and a demurrer to the declaration for not showing such writing and signature will be overruled. 1 Chitty Pl. 252; Id. 332, where the English and American cases are collected. But the reason assigned for these rulings is of itself sufficient to define the limitations of the rule. It is because courts will presume that the plaintiff or complainant, when speaking of a contract, means one which possesses all needful legal requisites, and which, if the law requires it to be in writing and signed, is in fact reduced to writing and subscribed by the defendant. Obviously this rule could have no application if it appeared affirmatively that the contract was deficient in these particulars; and accordingly it is now well settled that, both at law and equity, if the facts, the existence of which entitles the person against whom they are alleged to the benefit of the statute, appear in the pleadings, such person may take advantage of the statute by demurrer. Story Eq. Pl., secs. 580–588; Chitty Pl. 566.

Such, it is believed, was always the rule in respect of a plea. Greater nicety was required in a plea than a declaration; the presumption that a valid contract, fortified by all legal solemnities, was intended by the pleader was not indulged, and in a plea it was necessary to show distinctly that the contract set up was binding according to the requirements of the statute. 1 Chitty Pl. 566.

3. The objection, that the contract in writing admitted by the pleadings was a different contract from that on which

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the plaintiffs sued, has no force. The written contract provided for the delivery of certain merchandise to the defendant, which he was to pay for in a mode pointed out by that contract. At the end of a given time, no such payment had been made. Provision was also made for the return to the plaintiffs, by the defendant, of part of this merchandise, and for the merchandise so returned the defendant was to have credit. There was no return of any such merchandise, and no offer to return it. It followed that defendant had received the goods of plaintiffs, under this contract of sale, and had neither availed himself of the privilege of returning, nor paid for any part of them. Whereupon plaintiffs sued him for goods, wares, and merchandise sold, delivered, and not paid for. We are of opinion that this was the proper course for plaintiffs to take, that there is no error in the record, and we affirm the judgment, all the judges concurring.

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THE STATE OF MISSOURI, *ex rel.* FREDERICK F. GEHRING, Respondent, *v.* CHARLES CLAUDIUS *et al.*, Appellants

April 10, 1876.

1. **Affidavits in support of a motion to set aside a verdict on the ground of surprise will be disregarded when it appears that the party filing the affidavits anticipated the very evidence by which he alleges he was surprised.**
2. **When appeals are taken for delay only, damages may be given in actions *ex delicto* in form, on affirming judgments.**
3. **When a jury is examined on *voire dire*, the mode of examination is referred almost exclusively to the discretion of the trial court.**
4. **An officer serving a civil process has no right to enter a private house forcibly, against the will of the owner or occupant, and, when presenting himself at such house, it is his duty to answer fully and civilly any question as to the character in which he acts, especially if he wears no badge, and to refuse to answer such questions may make him liable to be treated as a trespasser.**
5. **The principal constable is liable for the acts of his deputy done under color of his authority.**

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6. It is the duty of the judge of the *nisi prius* court to preside when counsel address the jury upon the evidence admitted; and whenever, in the absence of the judge, any impropriety or irregularity is committed by the party in whose favor the verdict is rendered, such verdict should be set aside.

7. It is error to allow counsel to read to the jury, in the closing address, anything except the record, the evidence, and the instructions given in the course of the trial, or to refer to, and comment upon, an instruction offered by the other party and refused.

8. When the court, at the close of the testimony, proposes to counsel that they and the jury go to another room to argue the cause, the omission of a party to dissent from such proposal will not prejudice him.

9. When error appears in a record, and there is a possibility that the appellant has been prejudiced by it, the appellate court will reverse the judgment.

Appeal from St. Louis Circuit Court.

Reversed and remanded.

F. & E. L. Gottschalk, for appellants, cited: Douglass *v.* Stephens, 18 Mo. 367; Garretzen *v.* Duenkel, 50 Mo. 104; McKeon *v.* Citizens' R. R. Co., 42 Mo. 80; Schouler on Dom. Rel. 638; 2 Hill. on Torts (4th ed.), 152, sec. 23; 2 Hill. on Torts (3d ed.), 210, sec. 23; State *v.* Conover & Dutcher, N. J. 224; State *v.* Mann, 21 Wis. 634; People *v.* Schuyler, 4 Comst. (N. Y.) 173; 2 Hill. on Torts (4th ed.), 19, sec. 19; Hill. on Torts (4th ed.), 220, sec. 18; Wag. Stat. 1071, sec. 1, p. 1072, sec. 8, p. 1074, sec. 1.

Marshall & Barclay, for respondent, cited: Winters *v.* Hannibal & St. Jo. R. R. Co., 39 Mo. 469; Pennsylvania & Ohio Co. *v.* Graham, 63 Penn. St. 290; Smith *v.* Holcomb, 99 Mass. 552; Semaynis' Case, 3 Co. 91, part 5; Hagar *v.* Danforth, 8 How. (N. Y.) Pr. 435, and 20 Barb. 16; State *v.* Moore, 19 Mo. 369; State *v.* Muir, 20 Mo. 303; State, to use, *v.* Farmer, 21 Mo. 160; Walden *v.* Davison, 15 Wend. 575; Woodman *v.* Howell, 45 Ill. 367; Phillips *v.* City, 39 Ill. 83; State *v.* Woodward, 50 N. H. 527; Knowlton *v.* Bartlett, 1 Pick. (Mass.) 270; Swart *v.* Hutton, 2 Nev. & M. 426; Goetz *v.* Ambs, 27 Mo. 28; Calvert *v.* Alexandria, 33 Mo. 149; Devlin *v.* Clark, 31 Mo. 22; Brady *v.* Connelly, 52 Mo. 19; Matlock *v.* Wil-

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liams, 59 Mo. 105; State v. Hamilton, 55 Mo. 520; Loyd v. Hannibal & St. Jo. R. R. Co., 53 Mo. 509.

GANTT, P. J., delivered the opinion of the court.

Gehring sued Claudius and his sureties on a constable's bond. The charge was that one of the deputies of Claudius had committed a trespass on the plaintiff. This was done in the absence of Claudius, but his deputy entered into the premises of plaintiff under color of legal process addressed to his principal.

The answer denied the petition. The cause was tried in January, 1875, and there was a verdict for plaintiff, with $500 damages.

By the bill of exceptions it appeared that, when the jury was impaneled, the plaintiff's counsel questioned each of them touching his acquaintance with the parties to the suit, and the cause of action, which he stated to be an alleged unlawful arrest made by one Greenwald, deputy constable of Claudius, the other defendants being sureties of Claudius. After the jurors had answered to these questions, the counsel for defendants arose and began to address the jury as follows: "Gentlemen of the jury, this is a case where a deputy constable named Greenwald was going to serve a subpœna on the wife of plaintiff." At this point the plaintiff's counsel objected to the defendant stating his case at that stage of the proceedings. The court sustained the objection, and defendants excepted thereto at the time. The court directed the following questions to be put to the jury:

1. Do any of you know the parties to this case?

2. Do any of you know anything of this suit, which is brought for an alleged unlawful arrest of plaintiff by a deputy constable?

3. Has any one talked to you about this case since you were summoned as jurors?

To which some of the jurors replied that they knew some of the defendants, and the rest knew none of the parties. They all replied that they knew nothing of the suit, or the

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circumstances out of which it grew. The plaintiff then exercised his right of peremptory challenge, as did the defendants also, and the remaining twelve were sworn.

The plaintiff testified that on November 22, 1872, he was sitting in his breakfast-room reading a newspaper. His wife was at market. A man knocked at the door. Witness opened it and the man asked if Miss Cary was there. Witness said no such person was there. Then he gave a different name, but not witness'. Witness told him his name was Gehring, but no one named Cary was there, and asked the man what he wanted. He replied he wanted Miss Cary. Witness asked him his business, and he replied it was none of witness' business. Witness replied that if that was so he did not want him any longer in his house. Instead of going, he came into the room and walked towards the kitchen. Witness repeated: "I tell you to go out, if you will not tell your business or your name." He repeated it was none of witness' business. He showed no authority, badge, or paper, and witness took hold of him. He then showed his badge, which was covered by his overcoat. Witness said: "Why didn't you show me that before?" He replied: "Now I will arrest you." Thereupon he took hold of witness, and called to a man outside, who came into the room with an open knife in his hand. They took witness and carried him, without his hat or coat, to a justice's office, when his child brought his hat to him. Greenwald (the trespasser) took it out of her hands and threw it away. They swore out a warrant against witness, who, after some delay, gave bond and was released.

On cross-examination he said he lived on the east side of Carondelet avenue. The man who arrested him did not say he was a constable until he showed his star. Witness told him his wife was not at home; then witness asked who and what he was; he replied: "I will show you what I am."

Greenwald, called for plaintiff, testified that he went to

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406 Soulard street, to serve a subpœna on Hannah Gehring. He rapped at the street door and got no answer; then went to the back door. Gehring came to the door and asked what Greenwald wanted; he replied by asking if a party named Gehring lived there; he said no. Greenwald walked in and said he had a subpœna, and produced it, and told Gehring he wanted to summon the witnesses. He said his name was Gehring; Greenwald said he wanted Mrs. Gehring, and did not want him. He said: "You just go out;" witness replied that he would go as soon as he satisfied himself that Mrs. Gehring was not there. With that he stepped towards the kitchen, and Gehring took hold of him and scratched his neck and tore his shirt, whereupon Greenwald showed his star and arrested him with the aid of his partner. This witness told an altogether different story about the hat, and the walk to the justice's office. He said that Gehring was very much excited and very violent.

On the part of defendants, the subpœnas were put in evidence and Claudius was sworn, who testified that Greenwald was his deputy, but he knew nothing of this transaction until after it had occurred. This was all the evidence.

The court gave the following instructions:

1. "The jury is instructed that, if they find for the plaintiff, they will assess the damages at a sum sufficient to fully compensate him for all the injuries sustained by him directly by the acts complained of, in which they may properly consider the mental pain and suffering he may naturally have sustained by reason of the arrest complained of."

2. "The jury is instructed that the deputy constable, in attempting to serve a subpœna, has no right to forcibly enter a private house, against the will of the occupant, and that a resistance of any attempt to make such entry against the will of such occupant is perfectly justifiable in law."

3. "The jury are instructed that the defendants in this action are liable for all acts of Greenwald done under color

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of his position as deputy constable, and are answerable for any trespass committed by him under pretense of his authority as such deputy constable, the same as though such acts or trespass were committed by Claudius, the defendant, himself."

4. "If the jury believe from the evidence that Greenwald entered the private room of Gehring while the same was in the peaceable possession of said Gehring, and without the invitation or permission of said Gehring, and then refused to leave said room when ordered or requested so to do by said Gehring, then said Gehring had a right to eject him (Greenwald) from said room, using no more force than was actually necessary for that purpose."

To the giving of these, defendants excepted.

The court also gave the following, at the request of defendants:

"The court instructs the jury that if they believe from the evidence that plaintiff resisted the deputy constable in serving a subpœna, or interfered with him in the discharge of his duty, or made any affray, or did contend with hot and angry words, then said deputy constable had a right to arrest said plaintiff without warrant, and to bring him before a magistrate having jurisdiction of said offense, to be dealt with according to law."

And refused the following, defendants excepting:

1. "That if the deputy constable was outside of the line of his duties as such deputy, in making the alleged arrest of Gehring, then the defendants in this case are not liable, unless they were present, or consented, or directed him to do the acts complained of."

2. "The court instructs the jury that if they believe from the evidence that the acts complained of by plaintiff were committed by Greenwald without the knowledge or consent of defendants, and not in the scope or pursuance of his duties as deputy constable, the plaintiff cannot recover."

3. "That if they believe from the evidence that plaintiff

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had a private difficulty with one Greenwald, and that said Greenwald then committed the act complained of on his own motion, and without any command or order of defendant Claudius, and without the knowledge of said Claudius, then plaintiff cannot recover in this action against any of the defendants."

4. "If the jury believe from the evidence that Gehring, in the presence of Greenwald, contended with hot and angry words, or in any manner disturbed the peace, then said Greenwald had the authority, without warrant, to arrest said Gehring."

5. "That a constable or deputy constable in his county is a magistrate, and has power to be kept all laws made for the preservation of the peace."

6. "That it was not the duty of Greenwald to show a star, or to show any authority, to plaintiff Gehring, but said Gehring was bound to know that said Greenwald was a deputy constable."

Thereupon the cause was argued to the jury, "and, the judge having left the court-room, plaintiff's attorney did, on his argument, read to the jury" Article 5 of the Amendments to the Constitution of the United States, and comment thereon, and did also tell the jury that defendants, at the close of plaintiff's case, had asked an instruction from the court to the effect that, under the evidence, plaintiff could not recover; that the court had refused it, and that this showed that, according to the law and the opinion of the judge, there was evidence tending to show that plaintiff was entitled to recover.

The jury having found a verdict for plaintiff, defendants moved for a new trial, giving as reasons therefor the admission of improper, and the exclusion of proper, evidence; the refusal of proper, and the giving of improper, instructions; the commenting by the plaintiff's counsel on the refused instruction; the reading by him from the Constitution of the United States; that the verdict was against

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evidence; that the damages were excessive; and that the court did not permit the defendants fully to examine the jury.

They also filed a motion in arrest of judgment. The court overruled both motions, and, after the usual exceptions, the case is brought before us on appeal.

1. The first exception relates to the examination of the jury. We think the Circuit Court has committed no error here. The questions which it directed to be put were such as to test the competency of each juror, and this is the only purpose for which that examination is designed. The court was well justified in preventing an address to the jury by either counsel, at that stage, and this is all which it appears to have done. It neglected no means of testing the competency of the jurors, and took the plainest and shortest means of doing this.

2. The first instruction given for the plaintiff is unobjectionable. It does not occupy its proper place amongst its companions. Logically, it is the last of the series; but this is of no moment.

3. The second, third, and fourth instructions given at the instance of the plaintiff may be considered together. We think them a correct exposition of the law applicable to such facts as appear by this record.

An officer serving civil process has no right to enter a private house forcibly, or against the will of the occupant. When an officer knocks at a door of a dwelling, and it is opened, he does not by this opening acquire the right of rudely intruding, telling the proprietor, who inquires what he wants or what his name is, "that is none of his business," and persisting, after he has said that he has a subpœna for the wife of the proprietor and has been told that she is not at home, in searching the premises to satisfy himself of the truth of the information given him. Still less has he the right of thus intruding without the disclosure of his official character. It is very important that no resist-

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ance should be offered to the execution of process. It is vital to the stability of our institutions that the law should be regarded as supreme; that every citizen should yield to it a cheerful obedience; and that every person charged with its administration or execution should be respected, and, far as needful, aided by every member of society. This obligation should be impressed upon the minds of all, and in proportion to its general recognition a community will be likely to be well or ill governed. But the inviolability of every one's house and person lies at the foundation of our liberty. Where either can be invaded capriciously, and without those checks and precautions which are prescribed (not by the Constitution of the United States, but) by the organic law of the State of Missouri, we shall have lost our right to be called a free people. It is the duty of every person who is charged with the execution of civil process to explain what would otherwise be a trespass, by showing his warrant and his official character. If he chooses to conceal these, he puts himself outside of the protection they give him, and becomes, in the eye of all to whom he refuses to state them, an aggravated trespasser. It need hardly be said that any one effecting admission into a private house for the purpose of stealing, or any other unlawful design, will greatly aggravate his offense by pretending to be an officer of justice, and thus disarming opposition. It is almost as clear that if an officer of justice so conducts himself in the performance of his duty that any impartial observer is at liberty to suppose him a mere malefactor, bent upon the commission of crime, those whom he thus induces to mistake his official character are innocent of any offense when they treat him as a wrongdoer. It is so easy for a constable, or other person charged with duties of a public nature, to give to all concerned notice of the capacity in which he acts; it is so essential to the freedom of the citizen that it should only be invaded or challenged in the name and by the authority of the law, that it is inexcusable for any one charged with the execution

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of legal process to withhold the information—we had almost said the proclamation—that what seems a trespass is only the performance of an official duty; and he who withholds such information not only takes all the risk of being treated as an insolent trespasser, but is guilty of bringing odium on the law of which he is the unworthy minister.

The principal is liable for all the acts of his deputy. Of course this does not mean that Claudius would have been answerable, criminally, for a felony committed by Greenwald; but he is answerable for the wrongful doing of any act of his deputy which might have been lawfully done had the deputy been armed with the appropriate process.

In illustration of what we have said we content ourselves with referring very briefly to the following authorities: *State, to use*, v. *Moore*, 19 Mo. 369; *State, to use*, v. *Farmer*, 21 Mo. 160; *Hutchinson* v. *York, Newcastle & Berwick R. R. Co.*, 5 Exch. 350; *Jackson* v. *Tollett*, 2 Stark. N. P. C. 37; *Bastonshill Coal Company* v. *Reid*, 3 Macq. Sc. App. Cas. 266–282, Lord Cranworth's opinion.

The instructions asked by defendants, and refused, were not law, and their refusal was not error. A detailed examination of them is not necessary.

We find no fault with the damages awarded by the jury. The testimony on the subject of the demeanor of Gehring and Greenwald was conflicting. According to the first, there were many wanton acts of insolence and brutality on the part of the deputy; according to the second, there was an absence of all, or nearly all, of these things. It was for the jury to say which of the witnesses they believed, and how much of the testimony of any witness was, in their opinion, entitled to credit. It was theirs to exclusively decide questions like these, and with their decision of them we cannot interfere. We are, however, of opinion that the judgment in this case must be reversed because of the action of plaintiff's attorney in stating to the jury, in the absence of the judge, that the court had refused an instruction

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asked by defendant, and in communicating to the jury the tenor of that instruction.

We have already expressed our opinion that, when the judge leaves the room in which the cause is argued before the jury, there are no adequate means of correcting any irregular practice into which the counsel for the parties may be betrayed. It is plain that the counsel who has the close of the argument possesses a great advantage over the other from the practice of any irregularity; and the temptation to resort to such irregularities is, it would seem, sometimes very strong. The difficulty of obtaining a second trial upon the ground of the verdict being against the weight of evidence is well known to the bar. Appellate courts in this State never interfere with a verdict on this ground; and the right of such interference is very sparingly exercised by the courts of first instance. It is, perhaps, inevitable that this should be so. It is a part of our mode of administering justice. When a party has had one fair trial before jurors of his own selection, or, at any rate, before jurors to whom no valid objection exists, with the advantage of a correct exposition of the law, and the exclusion of all extraneous matter which might improperly influence the triers of the facts in issue, he has no ground for asking for the submission of the issues to another jury. There must be an end of legal contests, as of all other controversies. The interests of the litigants and of society alike demand this; and generally, although it is very difficult to reconcile a party to defeat, the result will be acquiesced in, more or less contentedly, if it be felt that the matter has been once fairly tried. But has there been a fair trial of a cause when, in the absence of the judge, the parties argue the case before the jury, and the counsel having the closing speech states as evidence, to influence the action of the triers of the fact, matters which are not in evidence at all, and which, though perfectly true, should not have been permitted to be stated or made known to them? We think not. In this case

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plaintiff's counsel stated to the jury that defendants had asked the court to declare, at the close of plaintiff's case, that plaintiff had shown no right to recover; that the court refused to give this instruction; and that it thence resulted that the court was of opinion that plaintiff must have a verdict. The only evidence given by the defendants was of a formal nature; and the argument was very forcible that, if the plaintiff was entitled to recover, regard being had only to the evidence introduced by him, he was hardly less entitled when the evidence of defendants had been put in. Such an argument was very plausible. Had the plaintiff a right to make it?

Of course he could not make it with any effect without prefacing it by the statement of the instruction asked and refused at the end of plaintiff's case. We are of opinion that it was improper for such statement to be made; that the probable effect of it was to damage the defendants; and that, for this reason, the judgment of the Circuit Court must be reversed and the cause remanded for a new trial.

When such irregularities have been called to the attention of the Supreme Court of Missouri, and that tribunal has been asked to reverse a judgment because of their occurrence, its refusal to do so has always been reposed on the grounds which influence us in the present case. The Supreme Court of Missouri has declared, as we have already done (*State* v. *Morgan*), that a very strong case must be made out to justify a review on such matters of practice of the discretion of the judge who was present, and saw and heard all that is alleged as a reason for setting the verdict aside, and who overruled the motion for that reason made in the court below; that it is the duty of the court to check, and, if necessary, to rebuke any such irregularities as are complained of; and that, in short, a very strong presumption is raised of the invalidity of the reasons assigned, if the judge who *saw* and *heard* the whole matter has decided it to be of no weight. *Loyd* v. *Hannibal & St. Jo. R. R.*

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Co., 53 Mo. 509. Now, each one of these considerations is felt strongly by us. It is the duty of the judge at *nisi prius* to listen attentively to the statement each counsel makes of the case he proposes to support by evidence; it is, of course, his duty to be vigilant to exclude what is not relevant or competent as evidence; but we fear it is not so generally understood that it is no less the duty of the judge to preside when the evidence is discussed before the jury. We are, as we have already said, aware of the laudable motives which at times influence the court to suggest that the jury and counsel repair, at the close of the evidence, to another room, to argue to the jury upon the evidence, while the court proceeds to the trial of another cause. We have said, and we here repeat, that we consider neither party free to refuse to adopt the suggestion, and, therefore, that neither party is bound by the extorted consent to adopt it. We here add that we consider the defendant generally powerless to protest to any purpose against any such a deviation from regularity as is here complained of. If it occurred in the presence of the court, the judge would be remiss who failed, unsolicited, to rebuke the deviation. Every practitioner knows that a lawyer who objects to what is done or said by his antagonist in the closing speech prejudices his own case, perhaps seriously, unless his objection be crowned with decided results. If a deviation from propriety at such a stage is attempted in the presence of a judge who is properly mindful of his high office, the rebuke which comes unsolicited comes with double force; and it need hardly be said that, if it be understood that such rebukes wait on such aberrations, they will be of very rare occurrence. As little need it be said that their entire disappearance will remove one baneful cause of verdicts not in accordance with the evidence and law.

For the reasons given we are of opinion that the practice of sending the jury and the counsel to another room for the final addresses to the jury is full of danger; that it

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tempts to irregularities and improprieties, and that for these, if they occur, there is no remedy except by an assignment of them as a reason for a new trial; that counsel should not be required to object where an objection will naturally lead to an unseemly altercation—a dispute in which there is no arbiter; and that it is the duty of the court, on such occasions, to indulge every presumption against a verdict when such irregularities as are here complained of are shown. We here perceive a new difficulty. The court has heard and seen nothing; the parties are likely to be heated and prejudiced, and their counsel are apt to partake their emotions. Affidavits and counter-affidavits are filed. The court, being human, will be sorely tempted to approve of the step it suggested when the parties went to another room, and to treat the case as if every intendment, every presumption, was in favor of the regularity of the proceedings. The practical conclusion that a well-meant attempt to save time has resulted in a great loss of it will be unpalatable, and will, if possible, be rejected. Under such circumstances we shall have no right to be surprised if the party against whom this irregularity has operated feels that he is injured. This is enough to condemn a practice which is liable to such consequences. The most vital thing in the administration of justice is to decide correctly; second to this, but still very important, is so to decide that each litigant, however unsuccessful, should feel that he has had a full and fair hearing; at any rate, that he should not be at liberty to say or to feel, with any appearance of reason, that he has *not* had a full and fair hearing.

In the case before us it was objected that the counsel for plaintiff not only informed the jury of the tenor of the instruction which the court refused, but that he read and commented on a part of the Constitution of the United States. As to the first article of his alleged irregularity, we have already spoken; as to the second, we satisfy ourselves with saying that of itself it would hardly warrant a

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reversal. Obviously it is improper for counsel to read from a book in aid of their arguments to a jury; doubly so when no judge is present; because, although of course the counsel in this case, on both sides, are known to be incapable of such things, it is nevertheless in the power of a designing man to select a single disconnected and misleading sentence, from almost any book that ever was printed, and read it to the jurors as containing an authoritative declaration of the principles which should govern their deliberation. Because the practice is liable to this abuse at the hands of the unworthy, a prudent and honorable advocate will avoid giving it any sanction, and courts should repress it. Anything more harmless than the extract read by the plaintiff's attorney, in the case before us, can scarcely be conceived; and yet it was of no relevancy. The rights of our citizens to be secure in their persons and property do not depend on the Constitution of the United States and the legislation of Congress, but on our own organic law and the statutes of Missouri. These make ample provision for their protection. The corresponding provisions in the Federal Constitution are merely a definition of the obligations resting upon the agents of that government in its own comparatively limited sphere, and, clearly, the parties to this suit were not in the slightest degree affected by the ascertainment of those obligations. Strictly speaking, the Constitution of the United States had no more to do with their controversy than an edict of the emperor of China. The importance of the law of the case being declared by the court alone could hardly be better illustrated than by this mistake of counsel, which we hasten to say we believe to have been entirely innocent in intention, as well as harmless.

Our remarks on this subject are more extended than we could wish, but we desired to give expression to everything we have said on a point which seems to us of great practical importance. We will not say that in no case must a court send the parties and the jury to another room to

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argue a cause, after the evidence is closed, or that in no case must the judge absent himself from the court-room while the argument is in progress; but we have no hesitation in saying that the practice is full of risk; that it imposes upon counsel on both sides the obligation of the most scrupulous observance of professional propriety; and that any disregard of this obligation will incur extreme hazard of a reversal, if the party chargeable with it has profited by such disregard. All the judges concurring, this judgment is reversed and the cause remanded.

GANTT, P. J., delivered the opinion of the court on motion for rehearing.

We have carefully examined the motion and reasons for a rehearing in this cause, and are convinced that it is our duty to overrule it. The case is of sufficient importance and interest to justify a statement of the considerations by which we are led to this conclusion.

The counsel for appellant insist that it appears, by what has fallen from the court, that we consider a reversal of the judgment a concession to the demands of a dry and unmeritorious technicality. They proceed to call our attention to the fact that it has been repeatedly ruled by the Supreme Court of Missouri that a trivial error occurring in the trial of a cause will not be ground of reversal, when it is manifest that the error could not have prejudiced the appellant or plaintiff in error; and they close by invoking the time-honored maxim, "*consensus tollit errorem*," to show that the judgment of the Circuit Court should be affirmed.

1. As to the first point, we certainly did not intend, nor do we think the language of our opinion calculated to convey, the idea imputed to it. As the cause must be tried again, it would be at least culpably indiscreet in us to utter any expression which could be supposed to be a prejudging of the merits of the case—we mean the facts—to pass on which is the province of the jury. If we thought

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that such a fault could reasonably be imputed to the former expression of our views, we would be careful to modify it; but we cannot think so, and this positive disclaimer of such an intention will, we hope, leave nothing to be desired on this head.

2. The theoretical correctness of the proposition that a judgment should not be reversed for harmless error is undeniable. Yet the difficulty of determining when error is really harmless is so great, the task of applying the criterion is so full of risk, that we can scarcely commend the wisdom or the prudence of adopting the rule as a practical guide to conduct. But the counsel for respondent desire us to do more than this. They wish us to determine that, although in a particular case the result complained of has been reached by methods of which the law disapproves, still the broad merits are so plainly on the side of the prevailing party that it is safe to say the judgment is for the right side, and the appellate court must wink indulgently at a slight disregard of the strict law. This is not an over-statement of the appeal made to us. It is not entirely unfamiliar to human experience. It has been frequently urged upon courts of justice, and is, in our opinion, one of the most plausible, and therefore most pernicious, sentimentalisms that has ever perverted judgment. We dare not, by any sanction of ours, encourage an appeal fraught with such tremendous capacities for mischief. A court exercising appellate jurisdiction does not sit for the purpose of determining whether its individual members sympathize with the fortunes of the litigants whose cases are reviewed by them; nor to declare that, if the matter of fact had been submitted to them sitting as a jury, they would have rendered the verdict which is shown by the record; nor to say that, in any ordinary case, the judgment, though in violation of technical rules, is for the "right party"—for the party having the "moral right" to success. We sit to determine legal rights. In many cases we are, as individuals, sincerely sorry that,

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through some casualty, merits which appear to be substantial, have been sacrificed; but we are unable to give relief unless some rule of law has been violated to the disadvantage of the sufferer. At other times we are surprised at the apparent disregard, by a jury, of what seems to us very persuasive evidence, and the preference manifested for what, to us, appears far less satisfactory. If, in such a case, any misdirection as to the admission or exclusion of evidence, or as to the law applicable to it, has, in the hurry of a trial, fallen from the judge of the *nisi prius* court, we gladly correct the error. But, if nothing of this sort appears, we have nothing to do but to affirm the judgment. We cannot conceive of a more perilous, misleading, and odious power than would be implied and usurped if a court should decide a cause upon the general, vague, and irresponsible idea that M is the meritorious, and N the unmeritorious, party to the controversy. Such a power might be exercised at the promptings of the wildest caprice. It would be a purely arbitrary power. Its existence would be fatal to an orderly administration of justice, and its exercise could hardly fail to corrupt the bench. We do not speak here of that coarse form of corruption which consists in the taking of gifts for the betrayal of official duty, but of the insidious overthrow, by the conviction of a total freedom from all logical restraints, from all responsibility to the enlightened criticism of a learned and vigilant profession, of some of the most important guards to a well-considered judgment. If justice is administered according to the principles of jurisprudence, a judge may confidently appeal to the profession in whose presence he stands, and to whose approval he aspires, in vindication of his interpretation of the law. But if, in place of conformity with scientific reasoning and approved precedents, the decision of controversies be reposed on the fanciful notions which this or that judge may entertain of what he chooses to call "substantial justice"—if he who is sworn to administer

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the law presumes to think that, in a case of exceptional hardship, he may "wrest once the law to his authority," and, "to do a great right, do a little wr ong"—everything which is excellent in our institutions will have received a deadly wound. For of course no person of sober habits of thought can fail to see that, instead of the appeal being made to reflection and judgment, it will, under such circumstances, be made to feelings alone; that the "great right," and the "little wrong" will, nine times in ten, be determined by the sentimental aspect in which they are respectively regarded; that their hues will change as rapidly as those of the chameleon, and that one of the least of the evils attendant upon such an innovation in our practice will be the loss of all stability in judicial decisions.

The language in which some courts have justified disregard of an objection purely frivolous and technical—language which in almost every instance belongs to the description of "*obiter dictum*"—appears to have misled counsel into supposing that it is a safe practice to construct forensic logic out of judicial rhetoric. The ablest judges have expressed their aversion to "*obiter dicta*," but of course no blame can be imputed to advocates who endeavor to support their views by reference to anything to be found in the solemn decisions of a court of authority. The counsel for the respondent have, with great ability, endeavored to do this; but they have, we think, failed to note the practical injunction contained in one of the best considered utterances to be found in the reports of our own Supreme Court on the subject under consideration. What is there said is so clear, so pointed, that we cannot more satisfactorily illustrate our own views than by quoting from the decision to which we refer.

"It is, however, suggested that this error should form no obstacle to an affirmance of this judgment because the question of probable cause is a legal one, and the proof on

the record shows a want of probable cause. It is true that what constitutes probable cause has been determined to be a legal question, but the jury have still the right to pass upon the facts. When the facts are controverted, or the credibility of the witnesses is to be determined, the evidence must go to the jury" (for which the learned judge cited many cases). "And this was the course of the Circuit Court, in most of the instructions given in this case. Hence, the jury were told that the action of detinue could be maintained only for specific chattels, and there was evidence to show that the goods in possession of Amanda Higgins were not the same goods which had been mortgaged by Van Holls Higgins to Brant; but the weight and credibility of this testimony was left to the jury. We cannot undertake to conjecture on what point the case turned with the jury, nor what influence the seventh instruction may have exercised upon them. *The instruction was upon a material point in the case, and, though it would seem to have been superfluous, it may not have been harmless.*" *Brant* v. *Higgins*, 10 Mo. 728, Judge Napton delivering the opinion of the court.

We have italicised the very perspicuous and pointed summing up of the law on this subject contained in the last three lines of the citation. It is impossible, in our opinion, to add to the clearness of its statement or the significance of its warning. Indeed, who can venture to say that error ever has been, or ever will be, harmless? If an erroneous ruling has in *any* degree contributed to a result, who can, without arrogating to himself a power of discerning the thoughts and actions of mankind, which savors of presumption, pronounce that, if the error had not been committed, the result would have been unchanged. All that a prudent man will venture to say, in such circumstances, is that *it seems probable* that the result would not have been changed. But to decide dogmatically that it could not possibly have been changed will be held, we think, by all

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dispassionate men, to be "argument of slender wisdom." As we have just seen, it is not a mode of reasoning which finds favor with the Supreme Court of Missouri.

We confess to some feelings of surprise at the quotation to us, in criticism of our opinion in this case, of the maxim, "*consensus tollit errorem.*" If the counsel for respondent have carefully read the paper they impugn, we are at a loss to understand how they can suppose us forgetful of that time-honored apothegm. We took pains to express ourselves plainly as to this matter of consent, and it is depressing to find that we have so imperfectly succeeded. We dwelt upon the unreality of *consent* in such cases, because of the moral duress which effectually prevented anything like free choice. We aimed to say, in substance, that, when a party was not at liberty to say "no," it was inequitable to hold him prejudiced by saying "yes;" and so much stress did we lay on this distinction that we repeat the expression of our astonishment that we have been supposed to be neglectful of the rule that a man cannot be heard to object to what has been brought about by his own concurrence, because we have said that this concurrence shall go for nothing when it is the product of coercion, and not of free will. The other judges concurring, the motion for a rehearing is overruled.

THE STATE OF MISSOURI, *ex rel.* SUSAN MCCANN, Administrator of JOHN MCCANN, Plaintiff in Error, *v.* HENRY SMYTH, Defendant in Error.

April 10, 1876.

1. When judgment by default had been rendered by a justice, and on the following day the defendant made it appear to the satisfaction of the justice that on the day of trial he was confined to his bed by sickness, but had sought with due diligence to have himself represented at the trial, *held*, that the justice was warranted in setting aside the default.

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2. *Mandamus* is not the appropriate remedy for correcting an error of an inferior court.

ERROR to St. Louis Circuit Court.

Affirmed.

Matthew O'Reilly, for plaintiff in error, cited: Wag. Stat. 641–657, ch. 61; High on Rem. 184, sec. 241; State *v.* Bombaur, 44 Mo. 590.

A. R. Kellam, for defendant in error.

GANTT, P. J., delivered the opinion of the court.

The relator sued one Flanigan before the defendant in error, who is a justice of the peace of St. Louis county, for an unlawful detainer, and obtained judgment by default. On the following day the defendant Flanigan appeared, and showed to the satisfaction of the justice that he was on the day of the trial confined to his bed by sickness, and wholly unable to attend the trial of the case, and had attempted to cause himself to be represented and the trial postponed on account of his sickness, but by misadventure his efforts, after due diligence used by him, failed. Flanigan also showed, by affidavit, a meritorious defense to the action, and moved the justice to set aside the judgment and grant him a new trial. The justice thereupon granted his motion, being partly moved to do so because of the failure of the plaintiff to show an order of the Probate Court to her to take charge of the real estate of her decedent, and set aside the judgment, on payment of costs, and set the cause anew for trial. The plaintiff thereupon applied for, and obtained from the St. Louis Circuit Court, an alternative writ, commanding the justice to show cause why he should not be ordered to reinstate the judgment and issue execution thereon. By his return the above stated facts appeared, and that the judgment was for the recovery of the premises in dispute, \$954 damages, and \$742 as rents and profits.

The return also denied that plaintiff had no remedy except *mandamus;* alleged that, if she had a good cause of action, an opportunity was afforded by the action of the

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justice for her to make it appear; and further suggested that *mandamus* did not lie in such a case; that a *mandamus* was not the proper mode to compel the justice to give a particular specified judgment, or to set aside a judgment already rendered; and that, right or wrong, the action of the justice cannot be reviewed by *mandamus*.

The plaintiff moved to strike out the return and make the rule for a *mandamus* absolute, for the reason that the return was not verified by the oath or affirmation of the justice, and because the facts shown do not furnish a valid excuse for declining to do what the peremptory writ would order.

The court, in special term, overruled the motion and refused the writ, on October 11, 1875. On the following day an appeal was taken to the general term, where the judgment was affirmed.

1. We think the judgment of the Circuit Court should be affirmed. The case of *Pratte & Cabanné* v. *Judge of the St. Louis Court of Common Pleas*, 12 Mo. 194, may be an authority for the granting of a writ of *mandamus*, ordering the court below, in a given case, to give a particular judgment, but in this case we are of opinion that the action of the justice of the peace was conformable to principles of law and equity, and, if it were examinable on appeal, must be sustained.

It was, we think, the intent of the law-makers to give the justice, in a case of forcible entry and detainer, or unlawful detainer, greater powers than he possesses in the exercise of his ordinary jurisdiction. In no other case is he at liberty to set aside the finding of a jury, and grant a new trial of the issues, where there has been no judgment by default. But to justices of the peace is given jurisdiction of cases of forcible entry and detainer, and of unlawful detainer. Gen. Stat. 1865, ch. 187, sec. 5. The ordinary incidents of this jurisdiction and of the practice in justices' courts, so far as not modified by the special statute, attach in the case of forcible entry and detainer.

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In the general statute prescribing the practice in justices' courts it is declared that no appeal shall lie to the Circuit Court from a judgment by default in the justice's court, unless within ten days a motion has been made to set the default aside. Gen. Stat. 1865, ch. 185, sec. 2. This provision has not been repealed in the chapter respecting forcible entry and detainer, but the application of it to the practice there prescribed seems very apposite; and, certainly, if the defendant in the case before the justice here had attempted to take an appeal before making such a motion, he would have incurred great risk of having his appeal dismissed. But, if he was right in making the motion, the justice, in a proper case, was justified in granting it. The inconveniences of a new trial are so small, the hardship of allowing the judgment in the actual case to stand seems so grievous, and the conduct of the plaintiff in attempting to hold, with pertinacity, the advantage she has gained by the inevitable misfortune of the defendant are so little reconcilable with the hypothesis of confidence in the merits of her cause, that we have the less hesitation in affirming the judgment of the Circuit Court. All the judges concur.

Elizabeth Kennerly, Appellant, *v.* Ruby Ann Bragg, Respondent.

April 10, 1876.

1. In the case of a negotiable and negotiated promissory note, the receipt of principal and interest, after dishonor, by the holder, who purchased for value, is no waiver of the claim for damages.

Appeal from St. Louis Circuit Court.

General term reversed; special term affirmed.

A. R. Taylor, for appellant, cited: Wag. Stat. 215, sec. 7, p. 216, secs. 10, 11, 12, 15; Bangor Bank *v.* Hook, 5

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Greenl. (Me.) 176; Wood *v.* Watson, 53 Me. 300; Clark *v.* Schneider, 17 Mo. 295; Farrell *v.* Fritchle, 30 Mo. 190; Puckett *v.* Redman, 3 Miss. (2 How.) 688.

W. C. Bragg, for respondent, cited: Bangor Bank *v.* Hook, 5 Greenl. (Me.) 174; Warren *v.* Coombs, 20 Me. 139; Bayley on Bills (2d Am. ed.), 387; Page, Bacon & Co. *v.* Warren *et al.*, 4 Cal. 395; Kearner *v.* Kennedy *et al.*, 4 Har. & J. (Md.) 240; Johnson *v.* Frank, 16 Ark. 199; Phipps *et al.* *v.* Addison *et al.*, 7 Blackf. (Ind.) 375; Crawford *v.* Walcott, 11 Ohio, 145; Kendricks *v.* Lomax, 3 Comp. & J.; Bowers *et al.* *v.* Stoddard, 10 Metc. (Mass.) 375.

BAKEWELL, J., delivered the opinion of the court.

This is a suit, by the indorsee, for value, of a negotiable promissory note negotiated, for value, before maturity. The defendant is the maker of the note. The petition alleges demand on the maker, refusal, notice to the indorser, and protest, and says that, after maturity, defendant paid to plaintiff the principal and interest, and asks judgment for $140, being damages in lieu of protest on said note.

To this petition defendant demurred, on the ground that the petition does not set forth facts sufficient to constitute a cause of action, because—

1. "It is admitted that the principal and interest of the note are paid."

2. "It appears from the petition that damages, in lieu of protest charges, are asked for, when no part of the note is left unpaid to which damages may attach."

3. "Damages in lieu of protest charges are allowed only by the judgment of a court in an action brought on an unpaid bill or note, or on an unpaid balance thereof."

The Circuit Court overruled the demurrer, and, defendant refusing to plead, gave judgment for plaintiff. On appeal to general term, this judgment was reversed and the cause remanded.

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We entertain no doubt that the demurrer was properly overruled, and that plaintiff was entitled to judgment.

It is not contended that plaintiff could not have recovered principal, interest, and damages at 4 per cent. in a suit upon the note, had only a portion of the principal and interest been paid; but defendant claims that the receipt of the principal and all the interest is a waiver of the claim for damages.

The law on this subject, in this State, is too plain to leave any room for doubt as to its meaning. According to its terms there shall be allowed and paid to the holder of a negotiable promissory note, who has purchased or acquired an interest therein for a valuable consideration, by the maker and indorsers having notice of dishonor, damages at the rate of 4 per cent. on the principal sum specified in the note. The law gives this sum as liquidated damages, in lieu of protest charges, and other charges and expenses, and provides that, if payment of principal sum, interest, and protest charges, be made within twenty days after demand, or notice of dishonor, then no damages are to be recovered. Wag. Stat. 215–217, secs. 7, 10, 11, 12, 15, 16.

The petition shows that no payment was made till October 7th. The note was protested on June 29th.

It is not alleged that any tender was made, or that protest fees were ever paid, and it appears, from the petition, that plaintiff retained the note.

We are referred to some authorities in support of the position of defendant, but, on reference to them, we do not find that they support that position. On the contrary, they are either founded upon statutes whose provisions differ from our own, or they are aside from the question before us, or they support the view of the law taken in this opinion.

In *Page* v. *Warner*, 4 Cal. 395, the court hold the acceptance of payment of one set of bills of exchange a waiver of all claim of damages; but in that case the evidence of

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debt was surrendered and canceled, and the interest and protest fees were paid and accepted with the principal, and the court assigns these facts as the ground of its judgment. From the petition in the case at bar it affirmatively appears, on the contrary, that the note was retained by plaintiff, and that the protest fees were not paid.

It is unnecessary further to refer to authorities. It cannot be said that plaintiff waived her claim. The petition alleges that she accepted part of her due, but says nothing from which any waiver can be inferred.

The judgment of the Circuit Court at general term, reversing the judgment of special term, is reversed, and the judgment of the Circuit Court at special term is affirmed. The other judges concur.

CLIFTON WHARTON *et al.*, Respondents, *v.* MISSOURI CAR FOUNDRY COMPANY, Appellant. 1a 577 33a 190

April 10, 1876.

1. It is not competent to show a parol modification of a written contract after its terms have been broken, and without any consideration to support the alleged new agreement.
2. Time is not necessarily of the essence of a contract; and, where goods are to be delivered at a certain date, and are received and retained after the date fixed by the agreement for their delivery, it will be held such an interpretation of the contract, by the act of the party interested, as to work a waiver of the delay.

APPEAL from St. Louis Circuit Court.

Affirmed.

George P. Strong, for appellant, cited: Davis *v.* Talcott, 12 N. Y. 188; Russell *et al. v.* State Ins. Co., 55 Mo. 592; Brown on Stat. Fr. (3d ed.), secs. 306–308; Mattison *v.* Wescott, 13 Vt. 261; Thompson *v.* Hudson, 4 H. L. Rep. Cas. 16, 17; 3 Ph. on Ev. (4th Am. ed.) 378; Rob-

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erts on Fr. (2d Am. ed.) 89; Brown on Stat. Fr. (3d ed.), secs. 423, 432, 433, 434; 1 Greenl. on Ev. (2d ed.), sec. 304; Cummings *v.* Arnold, 3 Metc. 489, *et seq.;* Monroe *v.* Perkins, 9 Pick. (Mass.) 298; Bunce *v.* Beck, 43 Mo. 280; Bailey *v.* Johnson, 9 Cow. 115; Fleming *v.* Gilbert, 3 Johns. 530; Dearborn *v.* Cross, 7 Cow. 48; 3 Ph. on Ev. (4th Am. ed.) 355, note 940; Allen *v.* Jarvis, 20 Conn. 38; Cummings *v.* Dennett, 26 Me. (13 Shep.) 401; Sewall *v.* Fitch, 8 Cow. 219; 3 Ph. on Ev. (4th Am. ed.) 365.

Noble & Orrick, for respondents, cited: Eddy *v.* Baldwin, 32 Mo. 369; Green *v.* Gallaher, 35 Mo. 226; Henning *v.* United States Ins. Co., 47 Mo. 431; Hume *v.* Taylor, 63 Ill. 43; Cummings *v.* Arnold, 3 Metc. 486; Goss *v.* Lord Nugent, 5 B. & Ad. 65; 3 Ph. on Ev. (4th Am. ed.), secs. 1466, 1467; Bunce *v.* Beck, 43 Mo. 266; 12 Wend. 446; 13 Pick. (Mass.) 446; 4 N. H. 40; Stowell *v.* Robinson, 3 Bing. (N. C.) 928; 1 Ph. on Ev. (4th Am. ed.) 559, 561, 562; Marshall *v.* Lynn, 6 M. & W. 109; Dole *v.* Stimpson, 21 Pick. (Mass.) 387; Harvey *v.* Graham, 5 Ad. & E. 73, 74.

BAKEWELL, J., delivered the opinion of the court.

This is a suit for damages for breach of contract. It appears that plaintiffs, who are manufacturers in Pittsburgh, and defendant, which is a corporation engaged in car building in St. Louis, entered into a written contract, the terms of which are contained in a letter of proposals dated November 1, 1872, addressed by defendant to plaintiffs, and at that date accepted by plaintiffs in writing.

The letter is as follows: "We propose to contract with you for three hundred tons of bar iron of freight car specification, at $4.90 per 100, free from rates, cut to length where required, delivered in East St. Louis, four months settlement from date of receipt. One hundred tons to be delivered in November, and same in December and January."

Plaintiff delivered to defendant, under this contract, 136

tons of bar iron, which were accepted and paid for; of this by far the greater portion was received in November, but a considerable part was not received until during December. Plaintiff claims that the specifications were to be furnished by defendant on the first of every month; that no specifications were ever received, except those sent on November 1; that, the weight of the articles not being given, these specifications amounted to 136 tons, which were all delivered, as before stated, and of which 100 tons were shipped before November 26; that plaintiffs frequently demanded the specifications for December and January, but that defendant refused to furnish them, and refused to allow plaintiffs to carry out their contract; that iron declined in price about $10 or $12 a ton during the months of December and January, and that they were damaged by this breach of contract. Plaintiffs ask in their petition for $3,000 damages.

On the other hand, it is claimed by defendant that the specifications were not to be sent on monthly; that there was a delay in the forwarding of the supply of bars required by the contract to be sent on in December, and that the contract was modified by a parol agreement between defendant and a duly authorized agent of plaintiffs, one Hatry, to the effect that defendant was to receive, and plaintiffs to deliver, the remaining 164 tons before the end of February, for such prices as ruled on February 1st, which defendant says was $4.40 per hundred; that specifications were forwarded to plaintiffs in accordance with this modified agreement, but the iron was never sent on.

Defendant claimed that, by this breach of contract on the part of plaintiffs, he was damaged $1,000.

From letters in evidence it appeared that plaintiffs, on December 5th, wrote to defendant, urging it to send on its specifications and calling attention to the delay; that this letter was received and answered on December 9th, and the specifications promised; that on December 20th defendant wrote to plaintiffs as follows: "Do you not think

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it would be to your interest to cancel that part of our contract relating to January? The price of iron has settled materially, and we are now contracting at lower prices, based on decline." On December 24th plaintiffs answered, refusing to cancel.

It is claimed by defendant that after that date the contract was modified by Hatry. Hatry swears that he never made any such modification; that he merely received the proposition, to be sent to his employers, at Pittsburgh, for their action. He also swears that he was the general, and only traveling, agent of plaintiffs, but had no authority to sell below card rates, and had no authority to modify the contract.

Clifton Wharton, one of the plaintiffs, swears to the same thing, and that they refused to modify the contract in any way. In this he is corroborated by letters, his correspondence with defendant showing clearly that he required adherence to the original agreement. There was evidence that Hatry sold iron, collected money, and settled adjustments for plaintiffs, and that they recognized his actions in this respect. Whether, in making adjustments, he acted under instructions, the witness did not know. McWilliam, president of defendant, swears that he made the original contract with Hatry, and that Hatry did not refer to any instructions. Relying upon this evidence as to Hatry's authority as agent of the plaintiffs, and as foundation for evidence of a verbal modification of the contract sued on, between defendant and Hatry, as agent, defendant offered to introduce evidence tending to show that on January 3, 1873, by a verbal agreement between defendant and Hatry, as agent of plaintiffs, the contract sued on was modified, and a new contract, for the same articles of manufacture, at a reduced price, substituted for the one in suit, and that defendant offered to comply with this last agreement, and sent specifications in pursuance thereof, which plaintiffs refused to fill.

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To this evidence plaintiffs objected, because said modifications were not in writing. The objection was sustained, and defendant excepted.

The instructions granted for plaintiffs and defendant, and defendant's instructions refused, are noticed in the body of the opinion.

There was a verdict and judgment for plaintiffs for $1,583.40. A motion for a new trial having been made and overruled, and all exceptions having been duly saved, the case is brought to this court by appeal.

The grounds of error insisted upon for a reversal of this judgment are the ruling out of oral testimony as to the alleged modification of the written contract, and, also, the giving of instructions asked by plaintiffs and the refusal of those asked by defendant.

It is claimed by counsel for respondents that the contract sued on is within the statute of frauds.

We do not so regard it. It would appear to be a contract for goods to be manufactured, blending prices and compensation for work, skill, and material so that they cannot be discriminated.

But we do not regard this as material; the contract was in writing, and the rule that oral evidence cannot be introduced to contradict or vary its terms applies to all written contracts, whether within the statute or not. The question is whether the proposed evidence comes within any of the apparent exceptions which have been made by the courts to this most wholesome rule. The offer was as follows:

"Defendant then offered to prove by this witness that, by a verbal agreement between plaintiffs, by Hatry as agent, and defendant, the contract of November 1, 1872, upon which this suit was brought, was modified, on or about January 3, 1873, and that it was then agreed between the parties that defendant would send specifications for the remainder of the iron in February, and that plaintiffs would deliver it at the same place, of the same character, in the

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same time as specified in the contract of November, 1872, at such price as defendant should be able to purchase such iron of other parties on February 1, 1873, and that this agreement was substituted for the contract of 1872, and in lieu thereof."

This is not the precise modification of the original contract set up in the answer. But we pass that by.

We do not think that there was evidence that Hatry was authorized to make such a modification of the original contract. We think that he appears to have had no such power, and that it does not appear from the evidence that defendant had any reasonable ground to suppose that he was clothed by plaintiffs with any power in regard to their contracts but that of taking contracts at card prices.

But the evidence was otherwise incompetent. It is not easy to understand how it can, with strict accuracy, be said that a contract is modified after breach. Before breach, it is capable of modification in a legal manner; but after a breach, the performance of the original contract becomes impossible. A new contract may be made, but the old one, for all purposes of performance, is at an end; and, accordingly, the cases of oral modification of written contracts in the books are cases of a modification before breach, whilst performance is still possible.

It is competent, however, in the case of a written contract, whether within the statute or not, to prove a new and distinct agreement, whether as taking the place of the old contract, or supplementary to it; and, if subsequent to and involving the same subject-matter, it is immaterial whether the agreement be entirely oral, or whether it refers to, or adopts in whole or in part, the provisions of the former contract. But in such a case the old contract is entirely abandoned, and the new one must stand entirely on its own bottom, and have a sufficient consideration to support it.

The proposed so-called modification in the case at bar will not do at all. It is a perfectly *nude pact;* no recovery

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whatever could be had upon it. What consideration does the appellant attempt to show, moving to respondents? Appellant was to pay money, to be sure, but less than under the old contract. If I agree in writing to sell a man 100 bushels of coal, to be delivered on November 1st, at 15 cents a bushel, and fail to do so, I cannot plead a modification of the contract, and then show as a modified contract an oral agreement to sell him 200 bushels on that date at 20 cents. Yet this seems to be about what the offer of appellant amounts to, and we think it was properly rejected by the trial court.

The Supreme Court of our own State, in the case of *Henning* v. *United States Insurance Company*, 47 Mo. 439, has perhaps gone as far in admitting oral evidence to show a change of the terms of a written contract as any of the courts are disposed to go; but in that case the offer was to show that both parties subsequently acted on the verbal modification, and the court expressly says that, in case of modification of the terms of the written contract, there must be a sufficient consideration for the new parol agreement.

If respondents in the case at bar had acted upon the alleged new contract, there would have been some analogy between the cases. As they did not, there is none; and there is neither reason nor authority to support the proposition involved in the offer of the respondents to prove a modification of this contract by parol, after its terms had been broken by them, and without any consideration whatever to support the new agreement.

To permit the introduction of such testimony is to make written contracts worthless, and to put the most careful and the most careless man on a common footing of insecurity. The door for its admission should not be enlarged.

The instructions given by the court seem unexceptionable, and those refused were, in our opinion, properly refused.

The first instruction for plaintiffs directs the jury that the receipt and payment for the iron was a waiver, by defendant,

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of delay in delivery. This, under the evidence, was a correct instruction.

No exception was taken to the next instruction asked by plaintiffs.

For defendant the court instructed that a failure to deliver the 300 tons in January invalidated the contract.

Defendant asked seven instructions, which were refused. The first of these submitted to the jury the question of a parol modification of the contract.

The second, third, fourth, fifth, and seventh directed the jury to find for the defendant if plaintiffs had not complied with the contract, leaving out of consideration the waiver by defendant. The sixth instruction asked by defendant told the jury that, if Hatry was general agent of defendant, and exceeded his instructions in modifying the agreement, plaintiffs were bound, unless defendant had notice of the character of his instructions.

We think there was not evidence to show Hatry's power to modify this contract; but in any case, as the whole question of its modification was withdrawn from the jury, this instruction was of course refused.

We see no error in this record to warrant a reversal of the judgment; it is, therefore, affirmed. The other judges concur.

CARRIE M. NOYES, Respondent, *v.* PHŒNIX MUTUAL LIFE INSURANCE COMPANY, of Hartford, Appellant.

April 10, 1876.

W. K. N. made an application for life insurance, directed and forwarded to defendant at Hartford, by their agent at St. Joseph. The policy was made out, in accordance with the application, "to take effect when countersigned by the agent at St. Joseph," and was mailed to the agent, to be countersigned and delivered. W. K. N. died the day before the policy ar.'ved at St. Joseph. *Held*, that there was no completed contract of insu.'ance.

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APPEAL from St. Louis Circuit Court.

General term reversed; special term affirmed.

Frank Eno, for appellant, cited: Hoyt *v.* Mutual Benefit Life Ins. Co., 98 Mass. 589; Markey *v.* Mutual Benefit Life Ins. Co., 103 Mass. 78; Heiman *v.* Phœnix Mutual Life Ins. Co., 17 Minn. 153; Badger *v.* American Popular Life Ins. Co., 103 Mass. 244; Collins *v.* Ins. Co., 2 Big. 161; St. Louis Mutual Life Ins. Co. *v.* Kennedy, 6 Bush (Ky.), 450.

Chandler & Young, for respondent, cited: May on Ins., secs. 44, 61, 62, 63; Baldwin *v.* Chouteau Ins. Co., 56 Mo. 157; Hill *v.* Ressegieu, 17 Barb. 162; Keim *et al.* *v.* Home Mutual Ins. Co., 42 Mo. 38; Kentucky Mutual Ins. Co. *v.* Jenks, 5 Ind. 96; Cooper *v.* Pacific Ins. Co., 7 Nev. 122; Ang. on Ins., secs. 31, 35, 36, 37, 42; McCullough *v.* Eagle Ins. Co., 1 Pick. (Mass.) 278; Duer on Ins. 66, sec. 10; Lungstrass *v.* German Ins. Co., 48 Mo. 204; Hallock *v.* Ins. Co., 2 Dutch. (N. J.) 278, 279; Taylor *v.* Ins. Co., 9 How. 390; McComas *v.* Covenant Mutual Life Ins. Co., 56 Mo. 573; Wag. Stat. 1068, sec. 34; Meyers *v.* Ins. Co., 27 Penn. St. 270; Second *et al.* *v.* Steel, 20 How. 104.

BAKEWELL, J., delivered the opinion of the court.

This is a proceeding in equity to enforce the collection of a policy of insurance on the life of William K. Noyes, husband of plaintiff. The alleged insurance was for the benefit of plaintiff.

The answer of defendant admitted the making of the application for insurance referred to in the petition, but denied the completion of any contract of insurance.

The case was submitted to the court sitting as a jury, on an agreed statement of facts, and there was a verdict and judgment for defendant. On appeal to general term, this judgment was reversed; to the action of the court in genral term, in reversing the judgment for defendant at special term, defendant excepted, and the case is brought to this court by appeal.

From the agreed statement of facts, and the documentary

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evidence preserved in this record, it appears that on November 28, 1871, William K. Noyes, at St. Joseph, Missouri, made an application for insurance, signed by himself and directed to defendant at Hartford, Connecticut. This application was forwarded by Harry Conwell, defendant's agent at St. Joseph, Missouri, to the home office at Hartford.

The application contained a clause that "it is acknowledged and agreed, by the undersigned, that this application shall form the basis of the contract for insurance, which contract shall be completed only by delivery of policy." The policy contains a clause that it is "to take effect when countersigned by H. Conwell, agent at St. Joseph, Mo."

The application was received at Hartford, by defendant, in due course of mail, and its terms accepted by defendant, and on December 2, 1871, the policy was made out, in compliance with the application, and mailed to the agent, Conwell, to be by him countersigned and delivered to William K. Noyes, on payment of the first premium.

On December 4th, Noyes died; on December 5th, Conwell, the agent, received the policy at St. Joseph; on December 6th, plaintiff tendered the first premium and demanded the policy, which the agent refused to deliver, and returned the same to defendant, which it retained, and still keeps. Proofs of death were duly tendered and refused. There was no special agreement, between the deceased and defendant's agent at St. Joseph, as to when the policy should go into effect, nor was there any agreement between the parties to this suit except such as may be inferred from the facts and circumstances of the case as set forth. It was not required by defendant, or its agent at St. Joseph, that the first premium should be paid before the delivery of the policy to William K. Noyes, at St. Joseph; but payment was to be made upon delivery of the policy.

If from this agreed statement, and the application and policy in evidence, any binding obligation rests upon

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defendant, it is agreed that plaintiff has fulfilled everything required of her.

The plaintiff asks the court to grant the following declarations of law:

1. "That if everything necessary to complete the contract of insurance was agreed upon, and the only thing lacking to perfect the policy was the countersignature of defendant's agent at St. Joseph, then defendant cannot take advantage of the failure of its own agent so to countersign said policy, but the law will consider that done which ought to have been done."

2. "That if the facts agreed upon show, after the execution of the policy, the defendant mailed the same to its agent at St. Joseph, to be countersigned and delivered by said agent, then the law implies an agreement on the part of the defendant to have its said agent so countersign and deliver said policy, and, if said agent failed or refused to do so, the rights of plaintiff were not affected by such failure or refusal of said agent."

3. "The contract of insurance between defendant and deceased became complete whenever all things necessary to the consummation of said contract had been fully agreed upon between the parties."

4. "That, under the pleadings and facts agreed upon, plaintiff is entitled to recover."

These declarations of law were refused.

At the instance of defendant, the court gave the following declarations of law:

1. "That, on the agreed statement of facts and exhibits, the plaintiff has failed to establish a cause of action."

2. "That there is no evidence of a contract of insurance, or purpose to contract, otherwise than by a policy made and delivered upon simultaneous payment of the first premium."

3. "The acceptance of plaintiff's application is not evidence of a contract to insure, but only of a willingness to contract, upon payment of premium by party whose life was proposed to be insured."

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4. "Plaintiff is not entitled to recover unless there was a policy made and delivered in the life-time of William K. Noyes."

5. "The law presumes, in a contract of this kind, that the policy is not delivered unless paid for (which payment is the first premium, in this case), and if plaintiff has not proved a payment of the first premium during the life-time of William K. Noyes, or that such payment was waived by defendant, then there was no delivery, and plaintiff cannot recover."

6. "The burden is on plaintiff to show that the real intention and agreement of the parties was to pass the legal title and possession immediately on the making of the policy at the office in Hartford, and without payment of premium, or countersigning by agent at St. Joseph. Unless plaintiff has proved this affirmatively, he cannot recover in this action.

7. "The policy in suit did not become a contract in effect, not having been countersigned by defendant's agent at St. Joseph."

It was formerly held, both in England and America, that, to give vitality to an agreement, not only the minds must meet, but the fact of such agreement must be communicated; but these cases have been overruled, and it is now everywhere held that, as soon as an offer by letter is accepted, consent is given and the contract is complete, though the party making the offer may be ignorant of the fact.

It is strongly contended by counsel for the plaintiff, in the case at bar, that there was here a complete contract between defendant and plaintiff; that the countersigning of this policy was a merely ministerial act which the agent was compellable to perform, and which equity would consider as done, and that the delivery of the policy to the agent, or the depositing in the mail directed to him, was a delivery of the policy to the insured.

In *Badger* v. *American Popular Life Insurance Company*, 103 Mass. 244, the defendant sent to A. F. Badger,

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plaintiff's intestate, the policy in question containing the following clause: "Nor shall this policy be in force until it be countersigned by A. F. Badger, agent at Boston." This agent was himself the person whose life was to be insured. On his death the policy was found among his papers, not countersigned. He held it in his power to make it a valid contract by countersigning, but he did not do so. It was held that the company had a right to make this condition, and the court would not inquire into its motive; and, there being no evidence that it was waived, it was held that no contract of insurance existed, and defendant was not liable.

In *Heiman* v. *Phœnix Mutual Insurance Company*, 17 Minn., 153 it is held that making the policy, delivering the same to defendant's agent—whose duty it was to receive the premium and deliver the policy—and presentation of the policy to plaintiff's alleged agent, for payment of the premium, are not evidence of a contract to insure, but of a willingness to enter into such a contract on payment of the premium by the other party.

It is said by Judge Hare, in *Collins* v. *Insurance Company* (7 Ph. 201), that, if the minds of parties meet, in an agreement for insurance, the policy will be valid without actual delivery. The contract will not fail because the instrument which is the evidence of it is retained by the covenantor; his keeping will be regarded as that of the covenantee. But the one question is, was there such a contract?

Did the party alleged to be bound manifest an intention to put the instrument beyond his control and render it the property of the other party? In that case a policy was duly executed and sent to the agent of the company, but not delivered to the insured, and held till payment should be made of the premium, which was not done when the insured died, and the court held the contract of insurance incomplete.

In New Jersey it is held, in a case of fire insurance (*Hal-*

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lock v. *Insurance Company*, 2 Dutch.), that the contract is complete when the premium and risk is accepted. If no policy is made, only the plaintiff can sue on this contract, or force from them a policy in equity; that, under these circumstances, a policy drawn up and signed by the proper officers needs no further delivery; it is a vital policy as soon as signed, becomes instantly the property of the insured, and is held by the insured for his use; and that, by sending the policy from the home office to the local agent at the residence of the insured, they made the agent a trustee for the plaintiff, and, in effect, delivered the policy as if it had been mailed directly to the insured. In this case the loss occurred before the policy was actually delivered to the plaintiff's hands; but he had paid the premium.

It has been decided in Pennsylvania (*Meyers* v. *Insurance Company*, 27 Penn. 268) that, although a policy of life insurance may expressly require the countersigning of an agent of the company, it is not under all circumstances essential, and may be dispensed with on the principle of defective execution of powers, where the intention to execute is sufficiently plain.

And the Supreme Court of the United States has decided (*Tayloe* v. *Merchants' Ins. Co.*, 9 How. 390) that an agreement for fire insurance is complete when the terms have been agreed upon between the parties, and the reciprocal rights and obligations of the insurer and insured date from that moment, without reference to the execution and delivery of the policy, *unless these two elements are embraced within the terms agreed upon.*

The contract imports an obligation to execute and deliver a policy to the insured, and, in the contemplation of the negotiations, the policy executed in accordance therewith, and dated on the day of the completion, though not actually delivered till aftewards, or at all, will take effect from its date, *unless some other terms are expressly agreed upon.* In our own State it is held that, when an applica-

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tion is filed, and on the same day the company makes and signs the policy, the contract is complete, and in case of fire the insured can recover, though up to that date there has been no delivery. *Keim* et al. v. *Home Mutual Ins. Co.*, 42 Mo. 38; *Baldwin* v. *Chouteau Ins. Co.*, 56 Mo. 151.

These principles of these opposing cases are invoked by counsel on either side, and strongly insisted upon as decisive of this case. But we do not so regard them.

It is alleged in the agreed statement that there was no agreement between Noyes and defendant as to when the policy was to go into effect. When the defendants accepted the risk they fixed the date from which it was to begin, in the written policy signed by them and mailed to their agent. That date is said to be the date on which the policy should be countersigned by the agent at St. Joseph. Their agreement said, as plainly as words can say it: We accept this risk, to commence at such date after the arrival of this policy at St. Joseph as shall be fixed by our agent, who shall evidence it by countersigning the policy, and by the same act give this contract life. There is no other date whatever mentioned in the policy for the commencement of the risk. The insurance is for the term of the natural life of Noyes, to commence from the date of the countersigning of the policy. The policy did not reach St. Joseph till December 5th, and Noyes was then dead. The risk, therefore, never commenced. If the policy had been mailed direct to Noyes, if it had reached him while yet alive, yet, so long as it was never countersigned by the agent, the period limited for the beginning of the term of the risk never commenced, and the contract itself was not complete.

In matters of contract, insurance companies and other corporations stand before the equal laws as do natural persons. The courts cannot modify the contracts made by them, nor relieve against cases of apparent hardship arising from accident or neglect, by compelling the companies to do what they are not bound to do by the terms of their

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agreement. Had the contract in this case been complete, the agent might have been compellable to fix a day for the commencement of the risk prior to the death of Noyes. But the case does not stand so. The company had made no contract to insure.

The most that can be said is that negotiations had gone thus far—that defendant had said that their agent, on the arrival of the policy, might make a contract with Noyes on the terms therein named. It is difficult to see what language more fitted to convey this idea could be employed.

Not only does defendant expressly say that there is no contract until the policy has been countersigned after its arrival at St. Joseph, but it fixes the date of the commencement of the risk at a future, uncertain time, to be determined by this act. When the policy arrived at St. Joseph the subject of insurance no longer existed, and the negotiation was necessarily at an end. Had the agent then countersigned and delivered the policy, it would have availed nothing, for, to make it available, the risk must, by the express terms of the contract, by impossibility, have commenced then, and only then, after the destruction of the life of Noyes, the thing to be insured, which is absurd.

In this view of the case, it becomes unnecessary to comment upon the instructions given or refused. It is sufficient that the result at which the learned judge at special term arrived is correct. In our opinion the agreed case, and application, and policy in evidence fail to show any cause of action against defendant, and judgment was rightly entered for defendant at special term.

The judgment of the Circuit Court in general term, reversing the judgment of special term, is therefore reversed, and the judgment of the Circuit Court at special term is affirmed. The other judges concur.

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WILLIAM CASSIDY, Respondent, v. JAMES METCALF *et al.*, Appellants.

April 10, 1876.

1. By an agreement, in writing, C. sold to M. his one-fourth interest in the firm of J., C. & Co. Afterwards M. sought to recover at law, on the contract, the interest so purchased; whereupon C. filed a bill in equity to restrain M. from prosecuting his action, and asking that the contract be so reformed as to show that M. purchased a one-fourth interest in the *good-will* of J., C. & Co. *Held*, 1. That a one-fourth interest in the good-will of a commission business is not the subject of sale. 2. The good-will of a business is indivisible, and when one of four partners retires from a firm, the good-will, in its entirety, remains with the old partners. 3. A court of equity will not execute a contract for the sale of a good-will, nor will it enjoin proceedings at law under such an agreement.
2. Equity will not reform a contract on account of a mistake of law.
3. Where a party seeks to reform a contract so as to make him sell his good-will in a firm, he will not be heard if his conduct shows either that he did not intend to sell his good-will, or, having sold it, that he fraudulently or wrongfully seeks to deprive the purchaser of it. He who seeks the interference of a court of equity must not come tainted with inequity.

APPEAL from St. Louis Circuit Court.

Decree reversed and bill dismissed.

Thomas A. Russell and *A. J. Smith*, for appellants, cited: Smith v. Powell, 14 Law Rep. 90; Reny v. Martin, 4 Johns. 597; Durant v. Bocant, Beas. 201; Burt v. Powell, 28 Cal. 632; Hoover v. Reilly, 2 Abb. (U. S.) 471; Nelson *et al.* v. Davis, 40 Ind. 366; 44 Ind. 395; 46 Ind. 427; 49 Ind. 434; Wood v. Price, 46 Ill. 439; 9 Ala. 662; 15 Ala. 149; 25 Ala. 694; 27 Ala. 296; 29 Ala. 233; 14 Ill. 286; 18 Ill. 492; 53 Ill. 456; Sims v. Lyle, 4 Wash. 320; Wintermute v. Snyder, 2 Green (N. J.) Ch. 490; Broadwell v. Dame, 6 Ill. 600; Adams' Eq. 189, 191; 1 Story Eq. Jur., secs. 113, 121, 127, 151; Lyons v. Richmond, 2 Johns. Ch. 51, 60; Vin. Abr. tit. ch. N, Com. Dig. 3 F. 8; Hunt v. Rousmaniers, 1 Pet. 1; Murray v. Shotwell, 1 Johns. Ch. 512; Stores v. Baker, 1 Johns. Ch. 166; Arthur v. Arthur, 10 Barb. 9; Hall v. Reed, 2 Barb. 500; Gilbert v. Gilbert,

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9 Barb.; McElderry *v.* Shipley, 2 Mo. 25; Leavitt *v.* Palmer, 3 N. Y. 19; Stoddard *v.* Hart, 23 N. Y. 556; Gamer *v.* Bird, 57 Barb. 277; Thompson Scale Mfg. Co. *v.* Osgood, 26 Conn. 16; Morris *v.* Labarra, 58 Me. 26; Champlin *v.* Laytin, 18 Wend. 407; Harney *v.* Charles, 45 Mo. 157; Bingham *v.* Bingham, 1 Ves. 126; Lansdowne *v.* Lansdowne, Mos. 364; McAninch *v.* Longhlin, 13 Penn. 371; Wysche *v.* Green, 11 Geo. (Miss.) 159; Smith *v.* Jordan, 13 Minn. 271; Lyman *v.* United Ins. Co., 17 Johns. 372; Wemple *v.* Stewart, 22 Barb. 154; Glass *v.* Hurlburt, 102 Mass. 24; Stone *v.* Godfrey, 18 Jur. 162; Phibbs *v.* Cooper, Law Rep. H. L. 149; McCurdy *v.* Brithill, 5 Mon. 232; Lawrence *v.* Baubien, 2 Bailey (S. C.), 623; Daniel *v.* Mitchell, 1 Story, 172; Towns *v.* Smith, 1 Woodb. & M. 115; Carpenter *v.* Providence Ins. Co., 5 How. 185; Higbie *v.* Hopkins, 1 Wash. 230; Union Bank, of Georgetown, *v.* Geary, 5 Pet. 69; Hughes *v.* Blake, 1 Mas. 514; 3 Gill. & J. (Md.) 425; 1 Paige (N. C.) Ch. 239; 2 Gill. & J. (Md.) 208; 3 Wend. 532; 2 Johns. Ch. 92; 9 Cranch, 153; 3 Bland (Md.), 567; Winch *v.* Winchester, 1 V. & B. 378; Rich *v.* Jackson, 4 Bro. C. C. 515; Maybank *v.* Brook, 1 Bro. C. C. 84; Irnham *v.* Child, 1 Bro. C. C. 92; Lord Portmore *v.* Morris, 2 Bro. C. C. 219; Hare *v.* Sherwood, 3 Bro. C. C. 168; Jordon *v.* Sawkins, 3 Bro. C. C. 388; Costlake *v.* Till, 1 Russ. 376; Baxter *v.* Connelly, 1 J. & W. 580; Bozen *v.* Farlow, 1 Meriv. 459; Pars. on Part. 262, and note *v*; Shackle *v.* Baker, 14 Ves. 468; Story on Part. 170.

Ellis & Sullivan and *Hitchcock, Lubke & Player*, for respondent, cited: 1 Story Eq. Jur., secs. 152, 153, 156, 159; Story Eq. Jur., secs. 115, 116, 164, *b*, sec. 138, *e*; Bispham's Eq., sec. 190, note 4; Leitensdorfer *v.* Delphy, 15 Mo. 161; Tesson *v.* Atlantic Ins. Co., 40 Mo. 33; Hook *v.* Craighead, 32 Mo. 405; Hunt *v.* Bonsmaniere's Admr., 1 Pet. 13; Smith *v.* Jordan, 13 Minn. 271; Lyman *v.* United Ins. Co., 17 Johns. 372; Gillespie *v.* Moon, 2 Johns. Ch.

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595; Wemple *v.* Stewart, 22 Barb. 158; Keith *v.* Globe Ins. Co., 52 Ill. 518; Sewing Machine Co. *v.* Langworthy, 18 Wis. 444; McCurdy *v.* Breathitt, 5 Mon. 234; Courtney *v.* Falley, 1 Heisk. (Tenn.) 715; Henkle *v.* Royal Assurance Co., 1 Ves. 317; Townsend *v.* Stangroom, 6 Ves. 331; Shelbourne *v.* Inchequin, 1 Bro. C. C. 340; Coles *v.* Paige, 10 Paige (N. Y.) Ch. 534; Lawrence *v.* Barbein, 2 Bailey (S. C.), 651; Bradford *v.* Union Bank, 13 How. 66; Sugden on Vend. (7th ed.) 146, 159; Andrews *v.* Essex Fire & Marine Ins. Co., 6 Mas. 6; Adams' Eq. 171; Keisselbrock *v.* Livingston, 4 Johns. Ch. 144; Woodbury Savings Bank *v.* Charter Oak Ins. Co., 31 Conn. 517; Longhurst *v.* Star Ins. Co., 19 Iowa, 364; Jordan *v.* Stevens, 51 Me. 78; Freeman *v.* Curtis, 51 Me. 140; Botsford *v.* McLean, 45 Barb. 478; Burdet *v.* Simms, 3 J. J. Mar. (Ky.) 190; Young *v.* Coleman, 43 Mo. 179; Delaware Ins. Co. *v.* Hogan, 2 Wash. 4; Ledyard *v.* Hartford Ins. Co., 24 Wis. 496; White *v.* Williams, 48 Barb. 222; Wilson *v.* Strayhorn, 26 Ark. 28; Adams *v.* Stevens, 49 Me. 362; Brown *v.* Lamphear, 35 Vt. 252; 1 Story Eq. Jur., sec. 138, *k;* Farrar *v.* Patton, 20 Mo. 84; Dickerson *v.* Chrisman, 28 Mo. 140; Townsend *v.* Hawkins, 45 Mo. 289; 1 Story Eq. Jur., sec. 1522, *a;* Strong *v.* Stewart, 4 Johns. Ch. 167; Babcock *v.* Wyman, 19 How. 299; Wilson *v.* Drumrite, 21 Mo. 329; Tibeau *v.* Tibeau, 22 Mo. 81.

BAKEWELL, J., delivered the opinion of the court.

This is a bill in equity to reform a written contract on the ground of mistake; also, asking an injunction to restrain appellants from prosecuting their action at law, instituted to recover $12,000 damages for the alleged breach of said contract. A temporary injunction went, restraining the action at law. Defendants moved the court to dissolve the injunction and dismiss plaintiff's bill, and this motion was heard on the issues made by the pleadings. Both petition and answer are verified by affidavit. In their joint answer defendants deny every material allegation of the bill, and

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aver that the contract fully sets forth the intention of the parties.

On trial the court made a decree reforming the contract, as prayed, and making the injunction perpetual. A motion for a new trial having been overruled, and all exceptions being duly saved, the cause is brought to this court by appeal.

It is insisted by appellant that the Circuit Court erred in admitting testimony touching conversations and negotiations prior to the execution of the written instrument, and that the decree is unwarranted in law and unsupported by the evidence.

The contract to be reformed is as follows:

"*St. Louis, August 7, 1873.*

"Article of agreement entered into this day by and between W. L. Cassidy, of the firm of Irons, Cassidy & Co., St. Louis, Mo., party of the first part, and W. F. Moore and James Metcalf, of Brunswick, Chariton county, Mo., party of the second part. The party of the first part agrees to sell to the party of the second part his interest (one-fourth) in the firm of Irons, Cassidy & Co., a live-stock firm doing business in the city of St. Louis, State of Missouri; the party of the second part agreeing to pay the party of the first part three thousand dollars cash, and the remainder in a negotiable note, or young stock that they have on their farms near Brunswick, Mo.; possession to be given on 1st day of September, 1873; the party of the first part to receive for the one-fourth interest five thousand dollars, to be paid as above described. Given under our hands this day.

[Signed,] "W. L. Cassidy.
"Metcalf & Moore."

The allegation of plaintiff's bill is that the contract ought to read, "one-fourth interest in the *good-will of the* firm of Irons, Cassidy & Co.," the words, "good will of the," having been left out by mutual mistake.

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It appears from the evidence that, at the date of this agreement, respondent was one of the four members of the firm of Irons, Cassidy & Co., doing a very large live-stock commission business in Missouri, Kansas, and Nebraska. The net profits of the business for 1872 were about $40,000, the expenses about $8,000, and this business was done upon a joint capital of from $20,000 to $25,000. The actual assets of the firm at the time of the agreement were, however, worth something like $35,000, consisting partly of cash, and partly of accounts and bills receivable. Cassidy did not exactly know how much these accounts and bills were worth, but kept the general run of the matters—nearly enough to judge that his one-fourth interest in them was worth somewhere between $8,000 and $12,000. He wished to retire from the business because of a slight difficulty with his old partners, and, also, as he said, on account of his health, though it does not appear that there was anything the matter with him. He had tried to sell out, unsuccessfully, the person with whom he was in negotiation not acceding to his terms. He then wrote to Moore, of Metcalf & Moore, farmers and stock dealers near Brunswick, Chariton county, Missouri, proposing to sell out to them. Moore, after consulting Metcalf, came down at once, with some stock they had for sale, and entered into negotiations with Cassidy. Cassidy showed him the books, or a portion of the books, showing the profits for the preceding year, which Moore understood only from Cassidy's explanation, not being a book-keeper; and Moore and Metcalf, after seeing the three other members of the old firm, and ascertaining that they were willing to accept them in Cassidy's place, agreed to step into Cassidy's shoes, in the old firm, for $5,000 to be paid to Cassidy, $3,000 cash, and the balance in young stock, or notes. Metcalf & Moore accordingly sold out their stock on their farms in Chariton county, and removed to St. Louis with their families, and entered into

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the new firm, which retained the old name, a brother of respondent, Abner C. Cassidy, being a member of both firms.

Within a day or two after the creation of the new firm, respondent took the books of the old firm out of the old office, and proceeded, in another office in the immediate neighborhood, to pay off and collect debts and credits, and generally to settle up the old business. To this appellants made no objection, and showed, indeed, pretty clearly, by their whole action at the time, that they had no idea that they had any interest whatever in the assets of the old firm.

When Cassidy was selling out to Moore and Metcalf, he told them that he was going to abandon business in this locality, and proposed to move to Buffalo, Pittsburgh, or some distant point.

About a month after the sale, Moore and Metcalf paid $500 to Cassidy on account of a balance of $2,000 still due by them to him on account of the $5,000 they were to pay him. He had declined to take any of their stock in part payment, as it did not suit him. They also, at this time, made some effort to raise money by a note, to pay him in full.

On Christmas day the business of the old firm was wound up, and a complete settlement had between the old partners. The uncollected assets being divided, Cassidy received altogether, as his share of the assets of the old firm, between September 1st and Christmas, about $8,000. To all this, Moore and Metcalf, though they knew, or might readily have known, of it, made no objection.

But Cassidy, about January 1st, resumed his old business of live-stock commission merchant, within a few feet of his old business stand, the then business stand of the new firm. At this Moore and Metcalf were highly indignant, and remonstrated angrily with Cassidy at this, which they characterized as a breach of good faith. He replied that he had

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not agreed not to go into business in the same neighborhood, and considered that he had, under the terms of the contract, a perfect moral and legal right to do so.

Moore and Metcalf then consulted counsel, and seem then first to have conceived the idea that, by the terms of their contract with Cassidy, they had purchased his one-fourth interest in the assets of the old firm. On January 27th they instituted suit on the contract, and laid their damages at $12,000 for breach. The present proceeding to enjoin and reform was then commenced by Cassidy.

Meanwhile, the new firm did not get on harmoniously. The member who had taken charge of the books refused any longer to do so, whereupon one of the original partners declared he would withdraw, and, to avoid a lawsuit, and because they could not help themselves, having no agreement as to any fixed period for the new association, Moore and Metcalf, on February 9, 1874, 153 days after the formation of the new partnership, agreed to a dissolution by mutual consent, and, on final settlement, received $3,599 as their one-fourth interest in the net profits of the business during that time.

There was evidence tending to show that, shortly after the sale to Moore and Metcalf, Cassidy boasted to one Green, a stock dealer and farmer, neighbor of Moore and Metcalf, that he had concealed important facts in regard to the business, at the time of the sale—showing them the profits, but not letting them see large items of expenditure; and that he laughed at them as men ignorant of business, whom he had beguiled into paying $5,000 for what no one else would have paid $2,500. The evidence of Green in this respect is contradicted by Cassidy.

There is also testimony that Moore said, when he bought, that he was paying a high price for an air title; but this is contradicted by Moore.

The evidence is extremely voluminous. We have

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endeavored to give a fair statement of what appear, from this mass of matter, to be the substantial facts of the case.

It seems tolerably clear that Moore and Metcalf supposed that they were buying Cassidy's interest in the firm of Irons, Cassidy & Co., and that Cassidy thought that he was selling that interest. Both parties, however, believed that the sale of the interest of a retiring partner in a commission house did not pass his share in moneys already earned by the firm, debts due the firm, or moneys of the firm in bank, used by them for making advances to customers. The contract was drawn by Cassidy, who seems to be a clear-headed business man, having a good, plain English education and great experience in men and affairs. He says that he intended to use the word "influence," instead of "interest," in the contract; but that, at the moment of committing it to paper, the word would not come, and he popped down "interest" instead.

To counsel for respondent it appears clear that the statement in the last paragraph sought to settle this controvery in favor of respondent; that, on this theory of the evidence, here was a clear mistake—a mistake, not of law, but of fact—but, in any event, an undoubted mistake, against which equity must relieve by reforming the contract according to the admitted intention of the parties.

But several questions here arise: First. Was not this a mistake of law? If it was a mistake of law, the weight of authority is altogether that equity will not interfere. Second. Grant that this was a mistake of fact, and a case in which a court of chancery can grant relief, can the relief asked for in this case be granted under its peculiar circumstances?

Respondent asks us to reform the contract so as to make him sell his interest *in the good-will* of the firm of Irons, Cassidy & Co. Can he be heard, if his whole conduct from the date of the sale is such as to show, clearly, either that he

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did not consider that he had sold an interest in that good-will, or, having sold it, that he fraudulently and wrongfully sought to deprive the purchaser of the very thing he now professes to have sold.

What is the good-will of a business?

The best definition that has ever been given to it is that of Lord Eldon, that it is nothing else than the probability that the old customers will resort to the old place. *Crutwell v. Lye*, 17 Ves. 335. In this sense only is the good-will recognized by law as a pecuniary interest. Hence, the sale of a trade with the good-will leaves the vendor at liberty to set up the same trade in any other situation. Pars. on Part. 262, and cases. Now, on respondent's own theory, he sold a very unsubstantial and airy thing. His former copartners were under no obligations whatever to carry on the old business in the old place, and, in about four months, refused to do so. Meanwhile, respondent himself at once set to work to destroy any little value in this intangible good-will by setting up the same business next door, after leading appellants to buy by the statement that he was going to move to another city, or go out of the business altogether. His one-fourth interest in the good-will is what respondent says appellants bought. If so, it was an unconscionable act on his part to attempt to destroy whatever value there might be in that by starting the same business, in his own name, on the very spot resorted to by the customers of the old firm. Plaintiff has violated the very bargain he wants us to allow him to assert that he made. He does not come to us with clean hands in this matter; he has not done equity, and, therefore, he now seeks it in vain.

Besides, the one-fourth interest in the good-will of a commission business is a thing that cannot, probably, be sold. If it be nothing more than the probability that the old customers will resort to the old place, it was a thing indivisible in itself. One-fourth of it could not, in the nature of things, be sold. The good-will in its entirety went to the

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old partners when Cassidy retired; and, if Moore and Metcalf acquired anything, they acquired it, on respondent's theory of the contract, not from him, but from the old partners. We may well adopt the language of Lord Eldon here: "The court will certainly not execute a contract for the sale of a good-will; at the same time it will not enjoin against any proceedings at law under such an agreement. It cannot be conveyed; go and make what you can of it at law; if you can recover, very well; we won't prevent you; if you cannot, very well; we won't assist you." *Baxter* v. *Connolly*, 1 J. & W. 556. We will not so reform this contract as to make it a contract to sell nothing, or to sell a pretended right, which respondent, after it was sold, considered himself not bound to respect.

As these considerations dispose of the case, it is not necessary to go into the many other interesting questions which it presents, and which have been very ably and ingeniously handled by the counsel on either side, both in their valuable printed briefs and in the very interesting oral argument of the case.

It follows that the judgment of the Circuit Court should be reversed; and, in order that no possible question may arise as to the complete right of the respondent here to appeal, we will not remand the cause, but give final judgment here.

The decree of the Circuit Court is in all respects reversed and the bill is dismissed. The other judges concur.

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APPENDIX.

BEING A STATEMENT OF POINTS DECIDED IN CASES NOT REPORTED.

Where no statement and brief are filed by appellant, the appeal will be dismissed. *J. C. Wood* et al. v. *Atlantic & Pacific Railroad Company.*

Where errors are not assigned by appellant, the appeal will be dismissed. *City of St. Louis* v. *Leopold Rothschild.*

Where no assignment of errors, and no statement or brief are filed by appellant, the appeal will be dismissed. *Aug. S. Weil* et al. v. *Henry Gerhold; State, to use of John E. Bushnell,* v. *Thomas C. Sidwell; John Byrne, jr.,* et al. v. *John E. Mowry* et al.

Where a motion is made by respondent to affirm the judgment on presenting a transcript, it must appear from the record that an appeal has been allowed. *Frank P. Thompson* v. *H. N. Brown.*

Where the appellant fails to file a transcript and prosecute his appeal, and the respondent files a transcript accompanied by a motion for affirmance, the motion will be sustained. *Mike Grodt* v. *Hannah Martin; State, to use of Amanda Christy,* v. *Thomas Ryan.*

Where respondent has in his possession papers offered in evidence, which are essential to the completion of a transcript of the record, he can be compelled to produce them by proper application to the court, and, if no such step is taken by appellant, this furnishes no ground of excuse for

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a neglect to prosecute the appeal. *Henry A. Clover* v. *James Morrissey.*

1. It is error to dismiss an appeal from a justice of the peace for any defect in the proceedings before the justice.

2. Where the appellant fails to give notice of the appeal from the justices for two terms, the appellee is entitled to an affirmance in the Circuit Court. *Louis Caselhagen* v. *James Hazard* et al.

In a suit on a promissory note, where there is no evidence of a partial or total failure of consideration, or of any other ground of defense, it is not error for the court to instruct the jury to find for the plaintiff the amount of the note and interest. *Henry Lindhorst* v. *John R. Terry.*

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The grant of letters is a notorious act, and the administrator is liable to be sued from that date. Where suit has been commenced and the defendant dies, and the action survives, if the suit be not recommenced against the executor or administrator within one year from the grant of letters, and the claim is then barred by the general statute of limitations, it is forever barred. *Id.*

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A, under an execution against C, seized goods belonging to B, which were in the possession of C. The goods were claimed by B, but A gave bond and held the property. C became bankrupt, and the goods were taken by his assignee. *Held*, that A was liable to B for the value of the goods, and this liability was not affected by C's bankruptcy. *State, to use,* v. *Mitchell* et al., 386.

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The master of a boat, in ordering supplies, is the agent of those who have control of the vessel and the right to receive her freight. Mere ownership, without any right to the profit or usufruct, will not of itself make one liable for supplies furnished to her. *Id.*

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Such a bond must be interpreted as any other contract, by the rules determined by the Supreme Court of this State. *Id.*

Where a sheriff or constable has taken of an execution creditor an indemnifying bond to secure the person whose property is taken under execution, and such person improperly and unsuccessfully sues the officer for the trespass, such adjudication is not a bar to proceedings against the sureties on the bond. *Worley* v. *Heath* et al., 378.

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A, under an execution against C, seized goods belonging to B, which were in the possession of C. The goods were claimed by B, but A gave bond and held the property. C became bankrupt, and the goods were taken by

BOND—*Continued.*

his assignee. *Held*, that A was liable to B for the value of the goods, and this liability was not affected by C's bankruptcy. *State, to use*, v. *Mitchell*, et al., 386.

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After delivery of goods to a common carrier, and receipt of bill of lading therefor, the consignor loses all right of control over them except the right of stoppage *in transitu*. *Id.*

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Of a municipal corporation, is not, in general, judicially forfeitable, but when to it is added a special franchise, independent of the local government and operative beyond its limits, the latter is liable to forfeiture for non-user, misuser, or breach of condition. *State* ex rel. v. *Miller*, 48.

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When imperfectly acknowledged, the record imparts no notice. *Selking* v. *Hebel*, 340.

The purchaser of a chattel from a mortgagor in possession will hold against a mortgage not sufficiently acknowledged, though it be copied and indexed in the office of the recorder of deeds, and though the purchaser have actual knowledge of its existence. *Id.*

A mortgagee of personal property having brought an action of replevin against a second mortgagee who was in possession, the defendant brought into court the money due on the first mortgage and tendered it to the plaintiff. He did not plead his second mortgage, but relied on his possession and this tender. The plaintiff replied that since the commencement of the suit he had sold the property, under his first mortgage, to a third person. *Held*, 1. That the first mortgagee (plaintiff) was justified in replevying the property. 2. Upon the payment or tender of the debt, to secure which the mortgage was given, he was compellable to give up the property. 3. If before such tender he had, under the terms of the mortgage, sold the property, he will be excused for refusing the tender and failing to give up the property, but the burden of showing that he has so sold it lies on him, and, in the absence of all evidence on this subject, the court must presume that no such sale was made. *Williamson* v. *Gottschalk*, 425.

CHECKS.

One taking the check of a third party, under circumstances which would lead a man of ordinary prudence to suspect that the holder had no right to pledge it, or to pay it out for his own indebtedness, is bound to inquiry; and if, under such circumstances, he advanced money to the holder upon the check, or applies the same to the liquidation of an existing indebtedness of the holder, he will be held to refund the proceeds of the check in his hands to the owner. *Buckner* v. *Jones*, 588.

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COMMERCE.
A State law prohibiting the selling or keeping in one's possession certain game within a certain period of the year is valid, even when applied to game imported from another State, and in this application is not such a regulation of commerce as belongs exclusively to Congress. *State* v. *Randolph*, 15.

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A contract under which A had the right to sell lottery tickets, made in 1842, having expired by limitation in 1870, no one could have, under the acts of 1833 and 1835, or under the contract of 1842, a right to sell lottery tickets in Missouri. *State* ex rel. v. *Miller*, 48.

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CONTRACT—*Continued.*

One having rights vested in him by the State, for a certain purpose, cannot contract to surrender them to another in hindrance of the purpose for which they were vested. *Per* GANTT, P. J. *Id.*

But such a contract may be validated by subsequent act of the Assembly giving the State's assent to its being carried out according to the intent of the parties. *Per* LEWIS, J. *Id.*

Obligation of, not impaired by the enforcement of a condition imposed upon the assignor by the party with whom the original contract was made. *Id.*

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Contract of 1849, relative to lottery, being in force prior to 1865, was not affected by the constitutional prohibition of 1865. *Id. Dissenting opinion.*

A man of weak intellect from habitual drunkenness, and incapable of managing his own affairs, may contract with an attorney to have a guardian appointed for his protection. *Darby* v. *Cabanné*, 126.

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Defendant having deposited in bank the proceeds of a sale, with directions to apply the same, according to the terms of a contract with a third person, for the benefit of plaintiff, is not liable to plaintiff if the bank fails to apply the fund as agreed upon. *Bartlett* v. *Matson*, 151.

A agreed to pay B a certain sum for making a certain publication in the Sunday edition of a certain paper for one year. B discontinued the Sun day edition, but continued the Saturday edition. A, soon after, ordered the discontinuance of the publication, and paid for so much of it as had been made up to that date. B continued the publication to the end of the year and sued for the balance of the sum fixed by the original contract. *Held*, that he could not recover. *Sheffield* v. *Balmer*, 176.

Under a contract for building, the payments to be made in installments, as certain parts of the work are finished, if the structure, while in progress, be destroyed by inevitable accident, the builder is entitled to be paid such installments as are fully earned; but he has no claim for a proportional part of the next installment partially earned. *Richardson* v. *Shaw*, 234.

Where one having a contract to perform certain work is forbidden to proceed with it by the other contracting party, the former may maintain an action as if the work had been performed. *Park* v. *Kitchen*, 357.

Of sale, drawn and executed on Monday, is not vitiated because an account of the stock had been taken on Sunday. *Luebbering* et al. v. *Oberkoetter*, 398.

Partial or total payment of the consideration is not such a performance as will take a contract out of the operation of the statute of frauds. *Galway* et al. v. *Shields*, 546.

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CONTRACT—*Continued.*

It is proper to treat a defendant liable for goods sold and delivered, though it appears in evidence that there was a condition of defeasance to the sale of which he did not avail himself. *Id.*

It is not competent to show a parol modification of a written contract after its terms have been broken, and without any consideration to support the alleged new agreement. *Wharton* et al. v. *Missouri Car Foundry Company*, 577.

Time is not necessarily of the essence of a contract, and where goods are to be delivered at a certain date, and are received and retained after the date fixed by the agreement for their delivery, it will be held such an interpretation of the contract, by the act of the party interested, as to work a waiver of the delay. *Id.*

Equity will not reform a contract on account of a mistake of law. *Cassidy* v. *Metcalf* et al., 593.

CONVEYANCES.

One having conveyed property by deed is estopped to say that the manner of setting his hand and seal to the instrument was intended to give it an operation less broad than its purport. *Taylor* v. *Saugrain* et al., 318.

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If imperfectly acknowledged, the record imparts no notice. *Selking* v. *Hebel*, 340.

A conveyance made with the intent, in good faith, of paying one or more creditors, though its natural and necessary effect be to hinder and delay other creditors, is not, therefore, void in Missouri. *State, to use,* v. *Laurie* et al., 371.

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A conveyance made with the intent, in good faith, of paying one or more creditors, though its natural and necessary effect be to hinder and delay other creditors, is not, therefore, void in Missouri. *State, to use,* v. *Laurie* et al., 371.

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Cannot be taken from a judgment sentencing defendant to death, where the sentence has been executed. *State* v. *Brown*, 449.

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EVIDENCE.—When there is none to warrant a conviction in the trial court, the defendant will be discharged on appeal. *State* v. *Dieckhoff*, 83.

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"Immediately" will not supply the place of "then and there." *Id.*

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Action for cannot be maintained for injuries done to plaintiff's house by water soaking through a pond on defendant's ground, when the pond was formed by the erection of plaintiff's house. *Doerbaum* v. *Fischer*, 149.

In a suit to recover damages for the discharge of plaintiff from an employment to which he was entitled under contract, if the question of his qualification for such employment becomes material, the defendant should be permitted to ask him if he was competent for such employment. *Squire* v. *Wright* et al., 172.

The burden of proving incompetency is on defendant. *Id.*

The offer of defendant to give plaintiff employment at the same compensation, in the same general line of business, may be proved in mitigation of damages. *Id.*

Where the aggregate amount claimed is $1,200, and part of the claim, stated at $300, is excluded by an instruction, a verdict for $1,200 cannot be sustained. *Burns* v. *Wilson*, 179.

In an action for, against a constable for taking plaintiff's property under execution against another, if the jury find that plaintiff was not the true owner, he cannot complain that the judgment and execution were void. *State, to use,* v. *Tobin* et al., 186.

Measure of, where one contracting party forbids the other to complete the work which he was employed to do. *Park* v. *Kitchen*, 357.

For false representations as to the value of real estate. See FRAUD, 360.

In a suit for unliquidated damages a set-off is inadmissible. *May* v. *Kellar* et al., 381.

C. did work for K., which he refused to receive and pay for when finished. C. sued and obtained judgment for a sum smaller than that sued for. K. demanded, and C. refused to deliver, the work. K. satisfied the judgment and instituted suit. *Held*, that he was restricted in damages to the value as adjudicated in the former suit. *Kitchen* v. *Clark*, 430.

Where it is proved that the defendant intentionally threw vitriol upon the

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DAMAGES—*Continued.*

plaintiff, a verdict of $1,000 will not be considered excessive, however little the plaintiff may have been injured thereby. It is a case for punitive damages. *Munter* v. *Bande* et al., 484.

It is error to instruct a jury, in an action for trespass, as to exemplary damages, where there is no evidence of malice or oppression. *McMenamy* et al. v. *Cohick* et al., 529.

Waiver of, in case of a negotiated promissory note. See PROMISSORY NOTE, 574.

DEBTOR.

When a party not subject to garnishment is indebted to an insolvent person, a court of equity will, in some cases, aid a creditor of such insolvent in appropriating this credit to the satisfaction of his demand. *Luthy* v. *Woods*, 167.

DEED. See CONVEYANCES.

DEMURRER. See PLEADINGS.

DEVISE. See WILL; LEGACIES.

DIVORCE.

The statute requiring divorce causes to be tried by the court is not unconstitutional, as impairing the right of trial by jury. *Mead* v. *Mead*, 247.

A decree of divorce, granted upon a petition setting forth several causes for divorce, will not, if one of such causes be satisfactorily established, be disturbed because the others were insufficiently sustained by the proofs. *Id.*

DOMICILE.

A person domiciled in Missouri may spend the greater part of a year, or series of years, at another place without thereby forfeiting his domicile. He does not forfeit his domicile without an intention, definitely formed, to abandon his original domicile and take up another; and until this intention appears, either directly or by some act inconsistent with the retention of the old domicile, the presumption of the continuance of it is not overcome. In re *Walker*, 404.

DONATION.

A *donatio mortis causa*, consummated by delivery, conveys to the donee the legal title to the money or property given, for the purposes indicated by the donor, and such legal title will be enforced by courts of justice. *Trorlicht* v. *Weisenecker*, 482.

If such money or property passes into the hands of a donee, charged with a trust, and he promises the beneficiary to perform the trust, performance of such promise may be compelled by suit at law. If no such promise be made, performance of the trust may be enforced in equity. *Id.*

EQUITY.

When a party not subject to garnishment is indebted to an insolvent person, a court of equity will, in some cases, aid a creditor of such insolvent in appropriating this credit to the satisfaction of his demand. *Luthy* v. *Woods*, 167.

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EQUITY—*Continued.*

Will not reform a contract on account of a mistake of law. *Cassidy* v. *Metcalf* et al., 598.

A court of equity will not execute a contract for the sale of a good-will, nor will it enjoin proceedings at law under such an agreement. *Id.*

He who seeks equity must do equity. *Id.*

ESTATE.

Of an habitual drunkard may be subjected to the payment of a reasonable fee for the services of an attorney in the procurement of a guardian, and for moneys expended for costs. *Darby* v. *Cabanné*, 126.

ESTOPPEL.

What facts will be held to estop one from denying that he authorized another to change a note executed by him. *Merchants and Manufacturers' Insurance Company* v. *Maguire*, 228.

EVIDENCE.

When formal foundation is required, but evidence is introduced without laying foundation, and without objection, if it appear that the foundation could readily have been laid, it is too late to object to its omission in the appellate court. *State* v. *Morgan*, 22.

Testimony inadmissible in the form or for the purpose offered will be rejected, though admissible in a different form or for a different purpose. *Id.*

When professing to impeach a witness by showing former statements inconsistent with his testimony, his attention must be called with particularity to his supposed former statements. *Id.*

Parol testimony may be introduced to show that a written conveyance, absolute on its face, is in fact a mortgage, and is not testimony tending to vary a written contract. *Spalding* v. *Taylor*, 84.

When there is none whatever to warrant a conviction below, the defendant will be discharged on appeal. *State* v. *Dieckhoff*, 83.

If, in reducing to writing the confession of one charged with murder, his precise words are not used, and the confession is read against him at the trial, it is error to exclude testimony tending to show that his words had been misunderstood, and that he had not said what was stated in the writing, although the writing was signed by him. *State* v. *Brown*, 86.

When verdict is contrary to evidence, judgment will be reversed. *State* v. *Thornton*, 92.

In an action by the assignee of a promissory note, executed to an insurance company for a policy, the defense being that the policy was fraudulent and worthless, and that the plaintiff had full knowledge of the fact before purchasing, it is competent for the defendant to show that the insurance company had no real capital. *Terry* v. *Hickman*, 119.

In a suit to recover damages for the discharge of plaintiff from an employment to which he was entitled under contract, if the question of his qualifications for such employment becomes material, the defendant should be permitted to ask him whether he was competent for such employment. *Squire* v. *Wright*, 172.

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EVIDENCE—*Continued.*

Evidence of an offer by defendant to give plaintiff employment in the same general line of business, at the same compensation, may be given in mitigation of damages. *Id.*

Where there is a conflict of testimony as to material facts, and the law of the case is properly stated in an instruction, the verdict cannot be disturbed upon an assumption that the jury misconceived the law in a matter not particularly specified in the instruction. *Cole* et al. v. *Long*, 215.

Though unnecessary, if it cannot prejudice the rights of the opposite party, its introduction is not error. *State, to use,* v. *Johnson* et al., 219.

In a suit by the administrator of an indorsee against the indorser of a promissory note, the latter will not be allowed to testify in his own behalf that he never received notice of protest. *Lewis, Administrator,* v. *Weisenham*, 222.

When court may not instruct that testimony is presumptively true. See INSURANCE, 285.

Plaintiff sued as holder of an accepted bill of exchange, which was indorsed in the name of defendants D. & K., the payees, by their alleged agent. Defendants D. & K. denied the indorsement and the authority to make it, under oath. The agent's authority was not proved, but the indorsement was admitted in evidence against the other defendants, the acceptors. *Held*, erroneous, because plaintiff showed no title to the bill, which could only be made through a valid indorsement by D. & K. *Union Savings Association* v. *Diebold* et al., 323.

Judgment will not be reversed because an incompetent witness was allowed to testify to a fact which was proved by a competent witness. *Blackwell* v. *Baily* et al., 328.

In an action by a married woman and her husband, for trespass to realty, an answer filed by the trustee of the separate estate of the woman, in another proceeding for the possession of the same premises, is not competent evidence for plaintiff. *McMenamy* et al. v. *Cohick* et al., 529.

It is not competent to show a parol modification of a written contract after its terms have been broken, and without any consideration to support the alleged new agreement. *Wharton* et al. v. *Missouri Car Foundry Company*, 577.

EXECUTOR.

Moneys received by an executor as proceeds of a sale of realty under a power in the will, whether the power was duly executed or not, are assets, and the sureties are liable for their misappropriation. *Dix* v. *Morris*, 93.

An order of the Probate Court, that "no further process issue" against an executor or administrator, is not equivalent to a final settlement. *Vielhaber* v. *Eyermann*, 115.

A devisee cannot recover against the executor for rents collected by the latter, where the estate is unsettled and possibly in an insolvent condition. *Gamage* et al. v. *Bushell*, 416.

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EXECUTION.
Where the defendant in execution replevied goods levied on by the constable, and the constable obtained judgment and elected to take the assessed value of the goods, which was paid to him, and which exceeded the amount necessary to satisfy the execution, it was held that he was compelled to refund the surplus to the execution defendant. *Damm* v. *O'Connell*, 268.

FORFEITURE. See ADMINISTRATION, 320; See INSURANCE, 205, 229, 300, 317.
Special franchises forfeited, when. See CHARTER, 48.
Condition of, in an insurance policy, waived by action of the insurer in collecting assessments after notice. *Witte* v. *Western Mutual Fire Insurance Company*, 188.
Adultery of widow will not work a forfeiture, when. *Shamrock Benevolent Association* v. *Drum* et al., 320.

FRANCHISE.
Special franchise judicially forfeitable, when. See CHARTER, 48.

FRAUD.
A false statement as to the value or quality of land may be fraudulent in law, though made in good faith. *Brownlee* v. *Hewitt*, 360.
If such false statement excludes the possibility of honest error in judgment, is relied upon by a contracting party, and is the proximate cause of the transaction which results in damage to plaintiff, he is entitled to recover. *Id.*

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS.

GAME.
Preservation of. See COMMERCE, 15.

GIFT. See DONATION, 482.

GOOD-WILL.
A one-fourth interest in the good-will of a commission business is not the subject of sale. *Cassidy* v. *Metcalf* et al., 593.
The good-will of a business is indivisible, and, when one of four partners retires from the firm, the good-will, in its entirety, remains with the old partners. *Id.*
A court of equity will not execute a contract for the sale of a good-will, nor will it enjoin proceedings at law under such an agreement. *Id.*
Where a party seeks to reform a contract so as to make him sell his good-will in a firm, he will not be heard if his conduct shows either that he did not intend to sell his good-will, or, having sold it, that he fraudulently or wrongfully seeks to deprive the purchaser of it. He who seeks the interference of a court of equity must not come tainted with inequity. *Id.*

GUARANTY.
In an action on, for a balance due upon goods sold by P. to J., who had paid a part of the account, it is not error to refuse an instruction that the jury might find for P. "the value of the goods sold by P. to J." *Cole* et al. v. *Long*, 215.

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GUARDIAN.

May be appointed for a man of weak intellect, caused by habitual drunkenness. *Darby* v. *Cabanné*, 126.

HUSBAND AND WIFE. See EVIDENCE, 529.

An action for personal trespass is properly brought against both husband and wife, when committed by the wife. *Munter* v. *Bande* et al., 484.

IMPEACHMENT.

Of witness by former statement. See EVIDENCE, 22.

INDICTMENT. See CRIMINAL LAW, 3, 7, 19, 21.

INFANTS.

The relation of father is not essential to the position of next friend of an infant plaintiff. *Burns* v. *Wilson*, 179.

INJUNCTION.

Action on bond, and rules of interpretation. See BOND, 254.

INSTRUCTIONS.

Unimpeachable in their application to the evidence, may be refused if an instruction fully and properly commenting on the evidence has already been given. *Terry* v. *Hickman*, 119.

Containing the words "unless *each member of* the jury believe," etc., the words "each member of" may be stricken out by the court. *Stocke* v. *Mueller*, 163.

It is error to give an additional instruction to the jury after argument and submission of the cause, unless it appear that the party complaining could not have been prejudiced thereby, or that it was necessary in order to rectify some omission or oversight. *Burns* v. *Wilson*, 179.

Which assume as proved any of the material facts in issue, are properly refused. *Cole* et al. v. *Long*, 215; *German National Bank* v. *Studley*, 260.

In an action on a guaranty for a balance due upon goods sold by P. to J., who had paid a part of the account, it is not error to refuse an instruction that the jury might find for P. "the value of the goods sold by P. to J." *Cole* et al. v. *Long*, 215.

When there is a conflict of testimony as to material facts, and the law of the case is properly stated in an instruction, the verdict cannot be disturbed upon an assumption that the jury misconceived the law in a matter not particularly specified in the instruction. *Id.*

It is not error for the court sitting as a jury to refuse an instruction based upon a supposed state of facts, if it appears from the finding that the court did not believe such facts to have existed. *Smith* v. *Sauerwein*, 269.

It is not error to instruct a jury directly upon the legal effect of facts which are admitted, or which are so clearly proved, without countervailing testimony, as to be beyond dispute. *Slayback* et al. v. *Gerkhardt* et al., 333.

It is error to instruct a jury, in an action for trespass, as to exemplary damages, where there is no evidence of malice or oppression. *McMenamy* et al. v. *Cohick* et al., 529.

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INSTRUCTIONS—*Continued.*

It is not error to refuse to instruct that the evidence as to any material fact, in order to a recovery, must preponderate in favor of plaintiff. *Buckner* v. *Jones*, 588.

INSURANCE.

What will operate as an assignment of policy. *Griswold* v. *American Central Insurance Company*, 97.

Effect of removal of property insured, in certain cases, a question of fact and not of law. *Id.*

Effect of memorandum made upon the policy as collateral security. *Id.*

The knowledge of the agent and medical examiner of the insured that the applicant for insurance had an ordinary cold, which did not cause his death, was the knowledge of the insurer, and the insurer is estopped to set this up as a defense. *Coolidge* v. *Charter Oak Life Insurance Company*, 109.

Notice to the local agent for the purpose of placing insurance is notice to the insurer. *Id.*

When a building containing property insured against fire is used for purposes prohibited by the terms of the policy, and the insurance company, upon being notified thereof, declines to fix an increased rate of premium, and afterwards collects its regular assessments on the policy treating it as a subsisting contract, the condition of forfeiture is waived, and cannot be set up against an action on the policy after the burning of the insured property. *Witte* v. *Western Mutual Fire Insurance Company*, 188.

When assessments have been collected under such circumstances, all presumptions as to date are, in the absence of proof, against the party collecting, and the *onus* is on the insurer to show that the collections were upon assessments made before the alleged act of forfeiture. *Id.*

Where goods are insured on a "memorandum" or open policy, entries of shipments made on the blank book to which the policy is attached are as if made on the sheet on which the policy is written. *Edwards* et al. v. *Mississippi Valley Insurance Company*, 192.

The express assent of the insurance company to each such indorsement on the policy is not necessary, where such a consent may be implied by the previous dealings of the parties to the contract. *Id.*

Where the policy required that all shipments must be reported to the office of the company, and, by direction of the agent who procured the insurance, the assured had been in the habit of reporting shipments by mailing a statement of the same in an envelope, post-paid, and properly directed to the office of the company, proof of mailing such a letter, so directed and post-paid, will satisfy the condition; and it is not essential to such effect that the agent should have had authority to waive any requirement of the policy. *Id.*

A sum paid by the assured for salvage, on general average, may properly be included in a verdict against the insurer, under the general averment of loss and damage. *Id.*

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INSURANCE—*Continued.*

Where an open cargo policy was issued by an insurance company to A, who reported a shipment on a named steamboat, if, during the voyage, the goods, without necessity, are reshipped and lost, the insurer, not assenting to the reshipment, is not liable. *Mallinckrodt* v. *Jefferson Mutual Fire Insurance Company,* 205.

Where a policy contained two conditions, viz., (1) that, if default were made in the payment of any annual premium thereafter accruing, such default should not avoid the policy, but the sum insured should be proportionately reduced; (2) that, if assured should fail to pay annually, in advance, the interest on any unpaid notes or loans, owing on account of the premiums, then the policy should be void; *held,* that they were not inconsistent or contradictory, and a failure to pay the interest mentioned in the second condition forfeited the policy. *Russum* v. *St. Louis Mutual Life Insurance Company,* 229.

Where there was a dividend standing to the credit of the assured, it was the duty of the insurer to apply it to the interest due on the unpaid premium note, and the balance, if any, to the principal. *Id.*

Where there is no question of fraud, it is not error to refuse to instruct the jury, in a suit on a policy of fire insurance, that the matters sworn to by the assured in his examination by the agent of the company, after the fire, according to the provisions of the policy, were presumptively true for the purposes of the case at bar. *Schulter* et al. v. *American Central Insurance Company,* 285.

G. was insured March 5, 1870. It was provided that a failure to pay any of the annual premiums should avoid the policy. G. died March 11, 1873. The premium due on March 5, 1873, was tendered on March 7, 1873, but, G. being moribund, it was refused. *Held,* that the forfeiture was beyond remedy. *Gaterman* et al. v. *American Life Insurance Company,* 300.

House insured becoming vacant, the policy was forfeited under one of its conditions. *Dawson* v. *American Central Insurance Company,* 317.

Plaintiffs sued on a fire policy insuring the stock of a commission merchant which might be on hand in a certain warehouse at any time during a fixed period. The petition alleged that a lot of meat belonging to the holder of the policy was destroyed by fire during the period designated, but failed to show that it was in the warehouse mentioned in the policy. *Held,* bad on demurrer. *Todd* et al. v. *Germania Fire Insurance Company,* 472.

W. K. N. made an application for life insurance, directed and forwarded to defendant at Hartford, by their agent at St. Joseph. The policy was made out, in accordance with the application, "to take effect when countersigned by the agent at St. Joseph," and was mailed to the agent to be countersigned and delivered. W. K. N. died the day before the policy arrived at St. Joseph. *Held,* that there was no completed contract of insurance. *Noyes* v. *Phœnix Mutual Life Insurance Company,* 584.

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JUDGMENT.

Cannot be given for want of an answer, where part of the answer is stricken out, if enough remains to constitute a substantial defense. *Taylor* v. *Pearson*, 39.

Of ouster sustained, for forfeiture of franchise by failure of the conditions upon which it was granted. *State* ex rel. v. *Miller*, 48.

Will be reversed where the verdict is manifestly contrary to the testimony. *State* v. *Thornton*, 92.

Will be set aside where there is no evidence whatever to support it. *Stocke* v. *Mueller*, 168.

Will be affirmed on appeal where the record fails to show the proceedings of which error is alleged. *Saulsbury* v. *Alexander*, 209.

Will not be reversed because an incompetent witness was allowed to testify to a fact which was proved by a competent witness. *Blackwell* v. *Baily* et al., 328.

Where the sheriff or constable has taken an indemnifying bond to secure the person whose property is taken on execution, and such person improperly and unsuccesfully sues the officer for the trespass, such adjudication is not a bar to proceedings against the sureties on the bond. *Worley* v. *Heath*, et al., 378.

In a proceeding for unlawful detainer, may be assigned. *May* v. *Kellar* et. al., 381.

Where the instrument sued on is for the payment of gold coin, the judgment should be for the amount found due, payable in gold coin; not for the market value of it, payable in paper currency. *Id.*

After appeal to the Circuit Court from a justice of the peace, the judgment will be affirmed unless notice of appeal has been given before the second term of the court to which the appeal was taken. *Thurston* v. *Kansas Pacific Railway Company*, 400.

Against the principal, where the surety has been a party defendant and has filed an answer, is conclusive against the surety, though the suit was dismissed as to him before trial. *Stoops* v. *Wittler*, 420.

Cannot be entered for want of a reply where the facts admitted by the failure to reply, if true, would not entitle the adverse party to the relief sought. *State* ex rel. v. *Goodfellow*, 495.

By default may be set aside by the court rendering it, where the defendant on the day of trial was confined to his bed by sickness, and used due diligence to have himself represented at the trial. *State* ex rel v. *Smyth*, 571.

JUSTICE OF THE PEACE.

In a suit before, not founded on an account nor upon an instrument of writing, such a statement must be filed, before summons is issued, as will inform defendant of the nature of the claim, and specific enough to bar another action for the same cause. *Pattison* v. *Lutz*, 183.

Has no jurisdiction of an action on a covenant of warranty contained in a conveyance of land. *Birks* v. *Russell*, 385.

In St. Charles county has not jurisdiction of a suit to recover a horse alleged to be worth $75, and $50 for its detention. *Henks* v. *Debertshausser*, 402.

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JUSTICE OF THE PEACE—*Continued.*

May set aside a judgment by default where the defendant on the day of trial was confined to his bed by sickness, and used due diligence to have himself represented at the trial. *State* ex rel. v. *Smyth*, 571.

JURY. See CRIMINAL LAW.

Panel cannot be reduced by State's waiver of her challenges. *State* v. *Waters*, 7.

Statute requiring divorce causes to be tried by the court is not unconstitutional, as impairing the right of trial by jury. *Mead* v. *Mead*, 247.

Neither party has a right to demand a jury in a *mandamus* proceeding, where the only issue is as to the extent of authority conferred by law on an official body. *State* ex rel. v. *Goodfellow*, 495.

In a proceeding to open a street it should appear upon the face of the proceeding that the jurors had been examined and found disinterested, and qualified according to law. *State* ex rel. v. *City of St. Louis*, 503.

Mode of examination on *voire dire* almost exclusively within the discretion of the trial court. *State* ex rel. v. *Claudius* et al., 551.

LEASE.

A covenant on the part of the lessee to pay "all taxes whatsoever to be levied during the term" of the lease does not bind him to pay taxes which were assessed, but not levied, before the expiration of the term. *Vallé* v. *Fargo*, 344.

LEGACIES. See WILL.

The widow's right to the deceased husband's benefits in a benevolent association *held*, under its constitution, to be superior to that of the legatee. *Shamrock Benevolent Association* v. *Drum* et al., 320.

LEGISLATURE.

Had the power to legalize or forbid the selling of lottery tickets prior to 1865. *State* ex rel. v. *Miller*, 48.

Legislation, within the constitutional authority of the Legislature, cannot be annulled by courts for apparent rashness or improvidence in the enactment. *Id.*

LEVY.

As applied to taxation is not synonymous with "assess." *Vallé* v. *Fargo*, 344.

LIEN.

Where A exchanges personal property for land, taking a note for the difference between the value of the land and the personalty, secured by mortgage on the personalty, and receives a deed of the land, with warranty, and his grantor becomes insolvent, and it afterwards appears that certain taxes were a lien on the land at the time of the transfer, he cannot, as against other creditors of his grantor, have an equitable lien upon the personalty transferred for the amount of the taxes. *Chamberlin* v. *Peltz*, 183.

A furnace, not fastened down, but set upon a stand of brick-work, and which could be carried out without disturbing the ceiling, walls, or floor

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LIEN—*Continued.*

of the house, even though a fixture as between vendor and vendee, is not a fixture as within the meaning of the mechanics' lien law. *Baldwin* et al. v. *Merrick*, 281.

LIMITATIONS.

What is a "writing for the payment of money" under the statute of. *Shelton* v. *Wyman*, 180.

General limitation law is a bar to a claim in the absence of notice of the grant of letters, though the special statute is not. *Doerge* v. *Heimenz, Admr.*, 238.

Where suit has been commenced and the defendant dies, and the action survives, if the suit be not recommenced against the executor or administrator within one year from the grant of letters, and the claim is then barred by the general statute of limitations, it is forever barred. *Id.*

LOTTERIES.

Prior to 1865 the legislature had the power to legalize or forbid the selling of lottery tickets. *State* ex rel. v. *Miller*, 48. See CONTRACTS, 48.

MANDAMUS.

Where the only issue raised is as to the extent of authority conferred by law on an official body, neither party has a right to demand a jury. *State* ex rel. v. *Goodfellow*, 495.

Not the proper remedy for the correction of a judicial error. *State* ex rel. v. *Judge St. Louis Circuit Court*, 548.

An alternative writ of, to compel a trial court to enter final judgment in accordance with the mandate of an appellate court, will not be granted where the record does not disclose what the mandate of the appellate court was. *Id.*

Not the appropriate remedy for correcting on error of an inferior court. *State* ex rel. v. *Smyth*, 571.

MARRIED WOMEN.

The marriage of an executrix after having commenced suit disables her from further prosecuting the suit in any capacity, and the disability is not cured by an order making her husband co-plaintiff. *Vielhaber* v. *Eyermann*, 115.

Action by, for trespass. See EVIDENCE, 529.

MECHANICS' LIEN. See LIENS.

MISDEMEANORS. See CRIMINAL LAW.

MISUSER.

Forfeiture of special franchise for See CHARTER, 48.

MORTGAGE.

The interest of the mortgagor in personal property in the hands of the mortgagee is not subject to seizure under execution against the mortgagor. *Spalding* v. *Taylor*, 84.

MOTIONS. See PRACTICE.

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MUNICIPAL CORPORATIONS. See ORDINANCES, 490; ST. LOUIS, CITY OF, 495.

In proceedings to open a street a jury cannot arbitrarily select a portion of a street, or of the city, as a taxing district, and assess benefits against it, unless, perhaps, in the case of abutters. Such action is unconstitutional. *State* ex rel. v. *City of St. Louis*, 508.

It should appear upon the face of such proceedings that the land commissioner examined the jurors and found them disinterested, and qualified according to law. *Id.*

MURDER. See CRIMINAL LAW, 3, 7, 86.

NEGLIGENCE. See CARRIERS.

Where the question is as to real estate, and the facts are peculiarly within the knowledge of defendant, and plaintiff relied on his statements, the negligence of plaintiff in making inquiry will not relieve the defendant. *Brownlee* v. *Hewitt*, 360.

NEXT FRIEND.

The relation of father is not essential to the position of. *Burns* v. *Wilson*, 179.

NON-USER.

Forfeiture of special franchise for. See CHARTER, 48.

NOTE. See PROMISSORY NOTE.

NOTICE.

Notice to the local agent of an insurance company, for the purpose of placing insurance, is notice to the company. *Coolidge* v. *Charter Oak Life Insurance Company*, 109.

Of plaintiff's claim cannot be objected to as insufficient, after defendant has given an indemnifying bond under act approved March 8, 1855. *State, to use*, v. *Johnson* et al., 219.

After appeal from a justice of the peace, waiver of *dedimus* and acknowledgment of notice to take depositions is not a waiver of notice of the appeal. *Gluck* v. *Diebold* et al., 265.

The record of an imperfectly acknowledged mortgage imparts no notice. *Selking* v. *Hebel*, 340.

Of appeal from justice of the peace must be given before second term of the Circuit Court after the appeal was taken. *Thurston* v. *Kansas Pacific Railway Company*, 400.

One taking the check of a third party, under circumstances that would lead a man of ordinary prudence to suspect that the holder had no right to pledge it or pay it out for his own indebtedness, is bound to inquiry. *Buckner* v. *Jones*, 538.

OBLIGEES. See BOND.

OBLIGORS. See BOND.

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ORDINANCES.

Under the charter of St. Louis, 1870, an ordinance which passed the council and was presented to the mayor, but was not by him approved nor returned, did not become a law when the council adjourned *sine die* before the expiration of the ten days allowed by law for the return of the same by the mayor. *State* ex rel. v. *Carr*, 490.

OUSTER.

Judgment of ouster will be sustained where there has been a forfeiture of a franchise by failure of conditions upon which it was granted. *State* ex rel. v. *Miller*, 48.

PARTNERSHIP.

A business transaction between parties who afterwards become partners may be settled in a suit at law, notwithstanding such subsequent partnership. *Tunis* v. *Leutze*, 211.

The mere fact of part ownership of a boat does not make the part owners copartners. *Ward* et al. v. *Bodeman* et al., 272.

One partner cannot sue another at law respecting a matter arising out of an unsettled partnership account. *Mulhall* v. *Cheatham* et al., 476.

PATENT.

A mechanic, hired for the purpose of perfecting certain machinery, and bound to devote his skill and labor to the interest of those for whom the machinery is being worked, is not by that fact under any obligation to abstain from applying for a patent in his own name for such machinery, if otherwise entitled thereto. *Green* v. *Willard Improved Barrel Company*, 202.

Semble, that the question of the validity of a patent cannot be determined collaterally in a State court. *Id.*

PERSONAL PROPERTY.

A coffin inclosing a corpse, after interment, is not. *Guthrie* v. *Weaver*, 186.

PETITION. See PLEADINGS.

PLEADINGS.

In a suit to charge the indorser of a promissory note, an allegation that plaintiff had notice of demand and protest is sufficient to warrant the introduction of proof of due notice of demand, and refusal to pay by the maker. *Mechanics' Savings Institution* v. *Finn*, 86.

When part of an answer is stricken out, and enough remains to constitute a substantial defense, plaintiff cannot have judgment for want of an answer. *Taylor* v. *Pearson*, 39.

A demurrer under the sixth subdivision of section 6, Article 5, of the Practice Act is sufficient if the ground is stated in the very language of the act. *Darby* v. *Cabanné*, 126.

Under general averment of loss and damage the verdict against an insurer may include sum paid by the assured for salvage, on general average. *Edwards* et al. v. *Mississippi Valley Insurance Company*, 192.

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PLEADINGS—*Continued.*

Where a recoupment is pleaded for the purpose of reducing plaintiff's damages for breach of contract, it must appear on the face of the pleading that there is some cross-obligation growing out of the contract which has been violated by plaintiff. *Green* v. *Willard Improved Barrel Company*, 202.

Unliquidated damages, arising on an independent contract, cannot be pleaded as a set-off. *Id.*

When the second mortgagee of personal property, in possession, is sued in replevin by the first mortgagee, he may rely upon his possession and a tender of the money due on the first mortgage, without pleading his second mortgage. *Williamson* v. *Gottschalk*, 425.

To an action by the payee against the maker of a promissory note the defendant pleaded that the plaintiff had made to him a note for the same amount, conditioned for the conveyance of a particular tract of land, which conveyance had never been made. Plaintiff replied that a misdescription existed as to this tract of land; that the tract of land intended was another, for which he had made and tendered a deed, which defendant refused to receive. The court sitting as a jury found for plaintiff. *Held*, that this was not error. *Voorhis* v. *Busby*, 451.

Plaintiffs sued on a fire policy insuring the stock of a commission merchant which might be on hand in a certain warehouse at any time during a fixed period. The petition alleged that a lot of buffalo meat belonging to the holder of the policy was destroyed by fire during the period designated, but failed to show that it was in the warehouse mentioned in the policy. *Held*, bad on demurrer, as not stating facts sufficient to constitute a cause of action. *Todd* et al. v. *Germania Fire Insurance Company*, 472.

A demurrer to an answer will be sustained where the answer shows as a defense a contract void under the statute of frauds. *Galway* et al. v. *Shields*, 546.

POSSESSION.

The vendee not entitled to, in respect of real estate, when. *Cramer* v. *Stethem*, 144.

A person not in actual possession when the trespass was committed cannot maintain an action for trespass on real estate. *McMenamy* et al. v. *Cochick* et al., 529.

PRACTICE.

Appellate Courts.—Papers filed in trial courts, after the writ of error has issued, bill of exceptions made up, and trial court adjourned for the term, will not be considered. *State* v. *Foster*, 1.

What weight will be attached to decisions of trial courts on motions supported and resisted by affidavits. *State* v. *Morgan*, 22.

Giving of instructions, when not assigned below as a reason for a new trial, cannot be objected to on appeal. *Id.*

Too late to object in the appellate court that the jury were sent out of the court-room to hear the arguments of counsel, when it does not appear that any unfairness resulted, or that any objection was made at the time. *Burns* v. *Wilson*, 179.

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PRACTICE—*Continued.*

Will not interfere where no exceptions were saved to the rulings of the trial court, and there is evidence to support the verdict. *State, to use,* v. *Tobin* et al., 186.

Will not review the discretion of the Circuit Court in permitting a bill of exceptions to be signed and filed beyond the time limited by its own rules, if done within the time prescribed by the statute. *Saulsbury* v. *Alexander,* 209.

Judgment of the Circuit Court will be affirmed where the record fails to show sufficiently the proceedings of which error is alleged. *Id.*

Will discourage the presentation to them of petitions asking for remedial writs in cases which may involve the trial of an issue of fact. *State* ex rel. v. *Green,* 226.

Cannot order to be certified up, for their inspection, an original paper used in evidence in the court below. *Dawson* v. *American Central Insurance Company,* 317.

Judgment will not be reversed because an incompetent witness was permitted to testify to a fact which was proved by a competent witness. *Blackwell* v. *Baily* et al., 328.

A party at whose instance an objectionable instruction was given cannot complain of its supposed inconsistency with a proper instruction given for the adverse party. *Id.*

Where the value of a chattel in dispute is admitted by the pleadings, the discretion of the trial court in refusing to allow an amendment in that particular, at the close of plaintiff's case, will not be interfered with. *Selking* v. *Hebel,* 341.

Will not set aside the finding of a referee as being against the evidence where there is any evidence to support it. *Park* v. *Kitchen,* 357.

On motion for rehearing, will not notice an informality in the judgment which does not affect the substantial rights of the parties. *May* v. *Kellar* et al., 381.

An alternative writ of *mandamus,* to compel a trial court to enter final judgment in accordance with the mandate of an appellate court, will not be granted where the record does not disclose what the mandate of the appellate court was. *State* ex rel. v. *Judge St. Louis Circuit Court,* 543.

When appeals are taken for delay only, damages may be given in actions *ex delicto* in form, on affirming judgments. *State* ex rel. v. *Claudius,* 551.

When error appears in a record, and there is a possibility that the appellant has been prejudiced by it, the appellate court will reverse the judgment. *Id.*

CIRCUIT COURTS.—Have discretion as to the order of introducing testimony in certain cases. *Terry* v. *Hickman,* 119.

It is not error to allow a witness to refresh his memory from entries made by himself in the books of one of the parties to the suit. *Tunis* v. *Leutze,* 211.

Since the revision of 1855 it has not been necessary, in any case, for the Circuit Court, upon trying a cause without a jury, to set out in writing its finding of the facts upon which the judgment is rendered. *Mead* v. *Mead,* 247.

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PRACTICE—*Continued.*

Where counsel are sent out of the court-room to argue the cause to the jury, out of the presence of the judge before whom the cause was tried, if improper remarks are made to the jury on either side, calculated to prejudice the jury, a new trial should be granted, on the application of the party aggrieved, unless it clearly appears that no evil result was produced by these remarks. *Brownlee* v. *Hewitt*, 360.

The fact that the party aggrieved consented to argue the cause out of the presence of the court, when requested to do so by the judge trying the cause, does not constitute a waiver of his right to have the argument of the cause conducted in the presence of the court. *Id.*

It is error for a judge to absent himself during the closing argument of the cause before the jury. *Id.*

Where the exhibits were of great value, and, instead of being filed in the cause, were left in the custody of the clerk of the court, *held*, that the court properly overruled a motion to dismiss because they were not filed, they being placed within easy access of defendant. *Foster* v. *Atlantic & Pacific Railroad Company*, 390.

Where the instrument sued on is for the payment of gold coin, the judgment should be for the amount found due, payable in gold coin; not for the market value of it, payable in paper currency. *Id.*

On the trial of a case of trespass *de bonis asportatis*, it appeared that one of the plaintiffs had, since the commencement of the suit, sold and transferred his interest in the controversy to his co-plaintiffs. *Held*, that the other plaintiffs were properly permitted to continue the action in their name and to their use. *Luebbering* v. *Oberkoetter*, 393.

Judgment of the justice will be affirmed unless notice of the appeal is given before the second term of the court to which the cause is appealed. *Thurston* v. *Kansas Pacific Railway Company*, 400.

A judgment against a principal, obtained without fraud or collusion, which has not been satisfied, and in the entry of which there is no error, is conclusive upon a surety who was a party to such suit and who filed his answer, though, as to him, the suit was dismissed before trial. *Stoops* v. *Wittler*, 420.

Rights as between first and second mortgagees in an action in replevin by the first against the second. See CHATTEL MORTGAGE, 425.

An award of arbitrators will not be set aside merely because it is against the law and the evidence. *Mitchell* et al. v. *Curren* et al., 458.

The fact that the verdict is totally unsupported by evidence is not, of itself, evidence of partiality which will warrant the setting aside an award of arbitrators. *Id.*

It is not error for the trial court to refuse to look into the question as to whether there is evidence to support the award of arbitrators. *Id.*

Where immaterial issues are tendered, it is not error to refuse them. *State* ex rel. v. *Goodfellow*, 495.

In a *mandamus* proceeding, where the only issue raised is one as to the extent of authority conferred by law on an official body, neither party has a right to demand a jury. *Id.*

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PRACTICE—*Continued.*

Where the facts admitted by a failure to reply cannot, if true, entitle the adverse party to the relief sought, no judgment can be entered for want of a reply. *Id.*

After a rehearing is had, an appeal may be taken without a motion for a new trial having intervened. *State* ex rel. v. *City of St Louis*, 503.

Have no power to grant appeals unless the bond required by section 2, page 17, acts 1869, shall have been given. *Blanchard* v. *Wolff*, 520.

It is error to instruct a jury, in an action for trespass, as to exemplary damages where there is no evidence of malice or oppression. *McMenamy* et al. v. *Cohick* et al., 529.

It is not error to refuse to instruct that the evidence as to any material fact, in order to a recovery, must preponderate in favor of plaintiff. *Buckner* v. *Jones*, 538.

Affidavits in support of a motion to set aside a verdict, on the ground of surprise, will be disregarded when it appears that the party filing the affidavits anticipated the very evidence by which he alleges he was surprised. *State* ex rel. v. *Claudius* et al., 551.

When a jury is examined on *voire dire*, the mode of examination is referred almost exclusively to the discretion of the trial court. *Id.*

It is the duty of the judge of the *nisi prius* court to preside when counsel address the jury upon the evidence admitted; and whenever, in the absence of the judge, any impropriety or irregularity is committed by the party in whose favor the verdict is rendered, such verdict should be set aside. *Id.*

It is error to allow counsel to read to the jury, in the closing address, anything except the record, the evidence, and the instructions given in the course of the trial, or to refer to, and comment upon, an instruction offered by the other party and refused. *Id.*

When the court, at the close of the testimony, proposes to counsel that they and the jury go to another room to argue the cause, the omission of a party to dissent from such proposal will not prejudice him. *Id.*

CRIMINAL COURTS.—Confession may be admitted when there is full evidence of the *corpus delicti*, though the body may not have been found since the alleged murder. *State* v. *Brown*, 86.

A pardon for one offense is not a ground for discharge from indictment for another offense, committed at another time in another county. *State* v. *Creech*, 370.

A person charged with a criminal offense, if brought into court ironed, should have the fetters removed, at least from his wrists, during arraignment and trial, even though he be fettered because he is considered dangerous, or to guard against an escape. *State* v. *Kring*, 438.

In a trial for murder it is not competent for the defense to prove the contents of letters written by the accused to the deceased. *Id.*

Where the letters and papers found on the accused at the time of his arrest are brought into court, and counsel for the accused, without examining their contents, consent that they may all be offered in evidence and read

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PRACTICE—*Continued.*

to the jury by the State, it is too late, on a motion for a new trial, to object that these letters prejudiced the accused, and that counsel had no time to examine them. *Id.*

After the conclusion of the testimony for the State it should not be reopened; but where a witness for the State was recalled after defendant had opened, for the purpose of asking a question which he was not permitted to answer, this is no ground for a new trial. *Id.*

Great latitude is allowed counsel in their address to the jury, and, although the line of legitimate argument seems to have been overstepped by the counsel for the State, where the trial court has refused to interfere, the judgment will not be reversed on this ground, unless it is quite clear that the remarks were improper and calculated to prejudice the prisoner. *Id.*

An appeal will not lie from a judgment sentencing the defendant to death, where the sentence has been executed. *State* v. *Brown*, 449.

PRESUMPTION.

No presumption of a consideration different from that ascertained by the instrument itself arises because a seal imports consideration. *State* ex rel. v. *Miller*, 48.

Where the declared consideration is illegal, it will not be presumed that there was another and legal consideration, though it may in some cases be proved. *Id.*

Where assessments have been collected by the insurer, after notice of a breach of a condition in the policy, presumptions as to the date when the assessment was made are against the insurer. *Witte* v. *Western Mutual Fire Insurance Company*, 188.

When court may not instruct the jury that testimony is presumptively true. See INSURANCE, 285.

As to continuance of domicile. See DOMICILE, 404.

PROMISSORY NOTE.

What is a sufficient allegation to warrant the introduction of proof of demand and refusal to pay. See PLEADINGS, 86.

In an action by the assignee of a promissory note, executed to an insurance company for a policy, the defense being that the policy was fraudulent and worthless, and that the plaintiff had full knowledge of the fact before purchasing, it is competent for the defendant to show that the insurance company had no real capital. *Terry* v. *Hickman*, 119.

Where A, B, and C were makers, and D indorser, for value, of a negotiable note, the payment by A and B, each, of one-fourth of the amount of the note, will not discharge them from further liability on the note. *Missouri Loan Bank* v. *Garner* et al., 200.

What facts will estop the maker from denying that he authorized another to change it. *Merchants and Mechanics' Insurance Company* v. *Maguire*, 228.

Effect of the assent of the principal to the action of the agent in making or indorsing. See AGENT, 260.

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PROMISSORY NOTE—*Continued.*

A *bona fide* purchaser of negotiable paper, for value, without notice, becomes the owner of the same, notwithstanding any defect in the title of the person from whom he acquired it. *Franklin Savings Institution* v. *Hinsman*, 336.

To an action by the payee against the maker of a promissory note, the defendant pleaded that the plaintiff had made to him a note for the same amount, conditioned for the conveyance of a particular tract of land, which conveyance had never been made. Plaintiff replied that a misdescription existed as to this tract of land; that the tract of land intended was another, for which he had made and tendered a deed, which defendant refused to receive. The court sitting as a jury found for plaintiff. *Held*, that this was not error. *Voorhis* v. *Busby*, 451.

One who, at the request of the holder and payee of a note, adds his name to those of the original makers, in order to induce another to purchase it, is liable to the purchaser in the same manner as if he had been an original maker thereof. *Butler* v. *Gambs*, 466.

Mere discontinuance of an advertisement for the sale of real estate, under a deed of trust to secure a note, is not such a giving of time to the principal debtor as will discharge other makers of the note. *Id.*

In the case of a negotiable and negotiated promissory note, the receipt of principal and interest, after dishonor, by the holder, who purchased for value, is no waiver of the claim for damages. *Kennerly* v. *Bragg*, 574.

QUO WARRANTO.

The statute authorizing a private relator in *quo warranto* did not take away the right of the State to appear, by her law officer, as relator. *State* ex rel. v. *Miller*, 48.

REAL ESTATE. See CONVEYANCES.

When there is a new division line agreed upon between the vendor and the adjoining owner, the vendee cannot extend his possession to the old line by mere volition. *Cramer* v. *Stethem*, 144.

Fraudulent representation as to value of. See FRAUD, 360.

REFEREE.

Finding of will not be set aside by appellate court, as being against the evidence, where there is any evidence to support it. *Park* v. *Kitchen*, 357.

RELATOR.

Statute authorizing private relator in informations in the nature of *quo warranto* did not take away the State's right to appear, by her law officer, as relator. *State* ex rel. v. *Miller*, 48.

REPLEVIN.

Will not lie for a coffin and its contents, the contents being a corpse. *Guthrie* v. *Weaver*, 186.

A constable having levied upon personal property, the defendant in execution replevied the same. In the replevin suit the constable obtained judg-

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REPLEVIN—*Continued.*

ment for the property, or its assessed value, at his election. He elected to take the money, which was paid him, and which exceeded the amount necessary to satisfy the execution. *Held*, that the constable was compelled by law to refund the surplus to the execution defendant. *Damm* v. *O'Connell*, 268.

Rights as between the first and second mortgagees, in an action in replevin by the first against the second. See CHATTEL MORTGAGE, 425.

C. did work for K., which he refused to receive and pay for when finished. C. sued, and obtained judgment for a sum smaller than that sued for. K. demanded, and C. refused to deliver, the work. K. satisfied the judgment and instituted suit. *Held*, that he was restricted in damages to the value as adjudicated in the former suit. *Kitchen* v. *Clark*, 480.

REPLICATION. See PLEADINGS.

RESIDENCE. See DOMICILE.

RIGHTS.

Vested by contract with the State, cannot be interfered with by the enactment of penal statutes, or otherwise, by the State. *State* ex rel. v. *Miller*, 48.

Where certain rights are vested in A for a certain purpose, by act of the Legislature, he cannot surrender them to B without consideration, and in hinderance of the object for which they were vested in him. *Id.*

Of widow. See ADMINISTRATION, 320.

ROBBERY. See CRIMINAL LAW.

SEAL.

Imports consideration. *State* ex rel. v. *Miller*, 48.

SET-OFF.

A suit on an appeal bond being for unliquidated damages, a set-off is not admissible. *May* v. *Kellar* et al., 381.

SHERIFF. See CONSTABLE.

If a trespasser, the obligors in a bond to indemnify him for making a levy on personal property will be liable as trespassers, at the suit of the owner of the property. *Luebbering* et al. v. *Oberkoetter*, 393.

STATUTES.

In authorizing a private relator in *quo warranto* did not take away the right of the State to appear, by her law officer, as relator. *State* ex rel. v. *Miller*, 48.

Of another State will, in the absence of proof, be presumed to be the same as that of this State. *Selking* v. *Hebel*, 340.

STATUTE OF FRAUDS.

In cases not within, consideration need not be expressed in a written contract, and, if not expressed, may be shown *aliunde*. *Bartlett* v. *Matson*, 151.

A demurrer will be sustained to an answer which shows as a defense a contract void under the statute of frauds. *Galway* et al. v. *Shields*, 546.

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STATUTE OF FRAUDS—*Continued.*

Partial or total payment of the consideration is not such a performance as will take a contract out of the operation of the statute of frauds. *Id.*

ST. LOUIS, CITY OF. See ORDINANCES, 490.

Under an act of the General Assembly, approved March 18, 1867, entitled "An act to enable the city of St. Louis to procure a supply of wholesome water," the board of commissioners thereby created was authorized to require the exclusive use, by consumers, of a particular kind of hydrant, which the board considered best adapted to promote convenience of supply with the least possible waste. Such a requisition was a reasonable exercise of the discretion committed to the board, in its control of the water-works, and should not be interfered with by the courts. *State* ex rel. v. *Goodfellow*, 495.

The right of the board of water commissioners to make proper regulations concerning the use of water cannot be affected by any considerations with reference to the restraint of trade. *Id.*

STREETS. See MUNICIPAL CORPORATIONS.

SUMMONS.

Not authorized to issue, when. See JUSTICES OF THE PEACE, 133.

SURETIES. See BOND.

On an executor's bond are liable for the misappropriation of moneys received by the executor as proceeds of a sale of realty, under a power in the will, whether the power was duly executed or not. *Dix* v. *Morris*, 98.

Will not be released by an extension of time, unless the agreement to extend, between the debtor and creditor, is based upon a consideration sufficient to support a contract. *Newcomb* et al. v. *Blakely* et al., 289.

Judgment against the principal, where the surety has been a party defendant and has filed an answer, will be conclusive against the surety, though the suit was dismissed as to him before trial. *Stoops* v. *Wittler*, 420.

TAXES. See LIEN; MUNICIPAL CORPORATIONS.

As applied to taxation, the words "assess" and "levy" are not convertible or synonymous terms. *Vallé* v. *Fargo*, 344.

A covenant on the part of the lessee to pay "all taxes whatsoever to be levied during the term" of the lease, does not bind him to pay taxes which were assessed, but not levied, before the expiration of the term. *Id.*

TENDER. See CHATTEL MORTGAGE, 425.

To be effectual must be unconditional. *Kitchen* v. *Clark*, 430.

TESTIMONY. See EVIDENCE.

The order of introduction within the discretion of the trial court, in certain cases. *Terry* v. *Hickman*, 119.

TRADE-MARKS.

A person may sell the use of his name, in the manufacture and sale of an article, and courts of equity will restrain him from advertising and selling goods of the same quality under his own name, though actually made by him. *Probasco* v. *Bouyon* et al., 241.

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TRADE-MARKS—*Continued.*

Where one named "Oakes" sold the exclusive right to manufacture and sell "Oakes' Candies," he was restrained from manufacturing and selling candies made by him as "Oakes' Candies." *Id.*

What is essential to. *St. Louis Piano Manufacturing Company* v. *Merkel* et al., 805.

TRESPASS.

Where it appears, on the trial of a case of trespass *de bonis asportatis*, that since commencement of the suit one of the plaintiffs had sold and transferred his interest in the controversy to his co-plaintiffs, *held*, that the other plaintiffs might continue the action in their name and to their use. *Luebbering* et al. v. *Oberkoetter*, 893.

An action for personal trespass is properly brought against both husband and wife when committed by the wife. *Munter* v. *Bande* et al., 484.

Where it is proved that the defendant intentionally threw vitriol upon the plaintiff, a verdict of $1,000 will not be considered excessive, however little the plaintiff may have been injured thereby. It is a case for punitive damages. *Id.*

A person not in actual possession when the trespass was committed cannot maintain an action for trespass on real estate. *McMenamy* et al. v. *Cochick* et al., 529.

And when there is no evidence of malice or oppression it is error to instruct the jury as to exemplary damages. *Id.*

In an action by a married woman and her husband for trespass to realty, an answer filed by the trustee of the separate estate of the plaintiff, in another proceeding for possession of the same premises, is not competent evidence for plaintiff. *Id.*

TRIAL.

By agreeing as to time of, defendant in a murder case may waive other rights. See CRIMINAL LAW, 7.

For murder, defendant cannot be compelled to make peremptory challenges until a full panel is obtained. GANTT, P. J., *dissenting*. *Stat* v. *Waters*, 7.

TRUSTS.

One who accepts a trust is responsible for his negligence with reference to it. *Blackwell* v. *Baily* et al. 828.

When a *donatio mortis causa* passes into the hands of a donee, charged with a trust, and he promises the beneficiary to perform the trust, performance of such promise may be compelled by suit at law. If no such promise be made, performance of the trust may be enforced in equity. *Trorlicht* v. *Weisenecker*, 482.

USES. See TRUSTS.

VERDICT.

Changes in, presumed to have been made by direction of the court, with consent of jury, when. *State* v. *Steptoe*, 19.

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VERDICT—*Continued.*

Where an indictment contains two counts, charging different statutory offenses, and a verdict is rendered against defendant under one count, but assesses the punishment applicable only to the other, the cause will be reversed for correction. *State* v. *Pickles*, 21.

When contrary to the testimony, the judgment will be reversed. *State* v. *Thornton*, 92.

In an action for damages, where the aggregate amount claimed is $1,200, and $300 of the claim is excluded by an instruction, a verdict for $1,200 cannot be sustained. *Burns* v. *Wilson*, 179.

Against an insurer may, under the general averment of loss and damage, include sum paid by the assured for salvage, on general average. *Edwards* et al. v. *Mississippi Valley Insurance Company*, 192.

When there is a conflict of testimony as to material facts, the verdict cannot be disturbed upon an assumption that the jury misconceived the law in a matter not particularly specified in an instruction given, which properly stated the law of the case. *Cole* et al. v. *Long*, 215.

VESSELS. See BOATS, 272.

VESTED RIGHTS. See RIGHTS, 48.

WAGER.

Courts will not determine nor compel parties to pay. *Waterman* v. *Buckland*, 45.

"Option contracts" are wagers. *Id.*

WAIVER.

Defendant's right to a panel of the jury forty-eight hours before trial for murder may be waived. See CRIMINAL LAW, 7.

Waiver by the State of her peremptory challenges will not authorize a reduction of the panel of jurors in murder cases. See CRIMINAL LAW, 7.

Condition of forfeiture in insurance policy waived by the insurer collecting regular assessments after notice. *Witte* v. *Western Mutual Fire Insurance Company*, 188.

Of *dedimus* will not suffice as a waiver of notice of the appeal. *Gluck* v. *Diebold* et al., 265. See NOTICE, 265.

By consenting, at the request of the court, to argue the cause out of the presence of the court, counsel do not waive their right to have the argument conducted in the presence of the court. *Brownlee* v. *Hewitt*, 360.

Receipt of principal and interest, after dishonor, by the holder of a negotiable and negotiated promissory note, who purchased for value, is no waiver of the claim for damages. *Kennerly* v. *Bragg*, 574.

Waiver of delay in delivery of goods to be delivered at a certain date. See CONTRACT, 577.

WARRANTY.

In a suit for breach of warranty of soundness, in the sale of a horse, it must be shown that the disease existed at the date of the sale. *Stamm* v. *Kuhlmann*, 296.

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WARRANTY—*Continued.*

It was agreed that A's jack should be let to B's mare, and, if a mule colt resulted, B was to pay A $10; otherwise, nothing. *Held,* not to be a warranty of a mule colt. *Aubuchon* v. *Pohlman,* 298.

WIDOW. See ADMINISTRATION.

WILL. See LEGACIES.

Where the devisee under the will sued the executor for the recovery of rents of the estate by him collected, the estate being unsettled and possibly in an insolvent condition, *held,* that there could be no recovery. *Gamage* et al. v. *Bushell,* 416.

WITNESS.

Impeachment of by former statement. See EVIDENCE, 22.

May be permitted to refresh his memory from entries made by himself in the books of one of the parties to the suit. *Tunis* v. *Leutze,* 211.

WRIT OF ERROR. See APPEAL, 18.

WRIT.

A return of marshal, in proceedings before the land commissioner, that he "executed the writ by *having had personal service* on the following named defendants," naming them, is insufficient. *State* ex rel. v. *City of St. Louis,* 508.

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